DOCKET

No. 07-689

Title:	Gary Bartlett, Executive Director of the North Carolina State Board of Elections, et al., Petitioners v. Dwight Strickland, et al.
Docketed:	November 26, 2007
Lower Ct:	Supreme Court of North Carolina
Case Nos.:	(103A06)
Decision Date:	August 24, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 21 2007	Petition for a writ of certiorari filed. (Response due December 26, 2007)
Dec 20 2007	Motion for leave to file amici brief filed by Honorable Vernon Sykes and Honorable Roger Corbin.
Dec 21 2007	Motion for leave to file amicus brief filed by League of Women Voters of the United States.
Dec 21 2007	Brief amici curiae of Illinois, Louisiana, Maryland, and Ohio filed.
Dec 21 2007	Motion for leave to file amici brief filed by NAACP, Cindy Moore, Milford Farrior, and Mary Jordan.
Dec 22 2007	Waiver of right of respondents Dwight Strickland, et al. to respond filed.
Jan 9 2008	DISTRIBUTED for Conference of February 15, 2008.
Jan 15 2008	Response Requested . (Due February 14, 2008)
Feb 14 2008	Brief of respondents Dwight Strickland, et al. in opposition filed.
Feb 25 2008	Reply of petitioners Gary Bartlett, et al. filed. (Distributed)
Feb 27 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Motion for leave to file amici brief filed by Honorable Vernon Sykes and Honorable Roger Corbin GRANTED.
Mar 17 2008	Motion for leave to file amici brief filed by NAACP, Cindy Moore, Milford Farrior, and Mary Jordan GRANTED.
Mar 17 2008	Motion for leave to file amicus brief filed by League of Women Voters of the United States GRANTED.
Mar 17 2008	Petition GRANTED.
Apr 8 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 10, 2008.
May 30 2008	The time within which to file respondents' brief on the merits is extended to and including August 11, 2008.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday, October 14, 2008.
Jun 10 2008	Joint appendix filed.
Jun 10 2008	Brief of petitioners Gary Bartlett, Executive Director of the North Carolina

State Board of Elections, et al. filed.

Jun 17 2008 Brief amici curiae of Sanford Bishop, Jr., et al. filed.

Jun 17 2008 Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.

Jun 17 2008 Brief amici curiae of Nathaniel Persily, et al. filed.

Jun 17 2008 Brief amicus curiae of Campaign Legal Center filed.

Jun 17 2008 Brief amici curiae of Mexican American Legal Defense and Educational Fund, et al. filed.

Jun 17 2008 Brief amicus curiae of League of Women Voters of the United States filed.

Jun 17 2008 Brief amici curiae of Illinois, et al. filed.

Jun 20 2008 Motion for leave to file amici brief out of time filed by National Association for the Advancement of Colored People, et al.

Jul 17 2008 CIRCULATED

Aug 4 2008 Record received from the Supreme Court of North Carolina. (1 envelope)

Aug 11 2008 Brief of respondents Dwight Strickland, et al. filed. (Distributed)

Aug 18 2008 Motion for leave to file amici brief out of time filed by National Association for the Advancement of Colored People, et al. GRANTED.

Aug 18 2008 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Aug 18 2008 Brief amicus curiae of United States filed. (Distributed)

Aug 18 2008 Brief amici curiae of Pacific Legal Foundation, et al. filed. (Distributed)

Aug 18 2008 Brief amici curiae of American Legislative Exchange Council, et al. filed. (Distributed)

Aug 18 2008 Brief amicus curiae of Florida House of Representatives filed. (Distributed)

Sep 10 2008 Reply of petitioners Gary Bartlett, Executive Director of the North Carolina State Board of Elections, et al. filed. (Distributed)

Oct 1 2008 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Oct 14 2008 Argued. For petitioners: Christopher G. Browning, Jr., Solicitor General, Raleigh, N.C. For respondents: Carl W. Thurman, III, Wilmington, N.C.; and Daryl Joseffer, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED
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No. (1)

In the
Supreme Court of the United States

GARY BARTLETT, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.*
Grayson G. Kelley
Tiare B. Smiley
Alexander McC. Peters
Susan K. Nichols

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

November 2007 *Counsel of Record

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Gary Bartlett in his official capacity as Executive Director of the North Carolina State Board of Elections; Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn and Charles Winfree, in their official capacities as members of the State Board of Elections; Joe Hackney in his official capacity as Speaker of the North Carolina House of Representatives; Marc Basnight, in his official capacity as President Pro Tempore of the North Carolina Senate; Michael Easley, in his official capacity as Governor of the State of North Carolina; and Roy Cooper, in his official capacity as Attorney General of the State of North Carolina.

The respondents are Dwight Strickland, David Williams and Stephen Holland.

Pender County, F.D. Rivenbark and Eugene Meadows were among the plaintiffs in the action below. Pender County, F.D. Rivenbark and Eugene Meadows originally appealed to the North Carolina Supreme Court from the entry of summary judgment against them but later withdrew their Notice of Appeal.

Joe Hackney, as the current Speaker of the North Carolina House of Representatives, is the successor in office to James B. Black and Richard T. Morgan who were sued in their official capacities in the action below.

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The opinion of the North Carolina Supreme Court (Pet. App. 1a-50a) is reported at *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007). The partial summary judgment order (Pet. App. 51a-105a) and final judgment (Pet App. 106a-120a) of the three-judge panel of the Superior Court are unreported.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on August 24, 2007. (Pet. App. 1a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Section 2 of the Voting Rights Act is set out in Petitioners' Appendix at 121a-122a.

STATEMENT

This case presents a question of law that the Court has expressly left open on five occasions in the last quarter century and that now divides at least five United States Courts of Appeals and two state supreme courts: whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act. That legal question

is entirely dispositive of this case, which was decided below on cross-motions for summary judgment, because there is no serious dispute as to any of the following facts:

- North Carolina House of Representatives District 18, which includes parts of New Hanover and Pender Counties, is geographically compact.

- The African-American minority group in District 18 is politically cohesive.

- The white majority in New Hanover and Pender Counties votes sufficiently as a bloc to enable it usually to defeat the African-American minority's preferred candidates.

- The African-American population in District 18 is sufficiently large to nominate and elect a Representative of its choice, even though it constitutes less than half of the district's population.

- In fact, with limited but predictable crossover support from white voters, District 18's African-American voters (who constitute an outright majority of the district's Democratic registered voters) have now repeatedly nominated and elected their preferred Representative, who also is African-American.

- Without a district such as District 18 that contains part of New Hanover County and part of Pender County, African-Americans in this region of the State likely could not nominate and elect a Representative of their choice.

The outcome of this case therefore rests entirely on the legal conclusion that the inability to draw a district that is at least 50.01% African-American is fatal to any vote dilution claim under Section 2 of the Voting Rights Act. Petitioners respectfully request that the Court grant this petition and resolve this important federal question before redistricting begins again in the wake of the 2010 federal decennial census.

1. Since 1992, voters in House District 18 (previously House District 98) have elected an African-American to the North Carolina General Assembly. Although African-Americans comprise less than 50% of the total population of current District 18, African-Americans comprise 54% of the registered Democratic voters of the district. The winner of the Democratic primary in this district has consistently won in the general election. Registered Democrats comprise 59% of the total voters in District 18.

When House and Senate districts were redrawn by the General Assembly in 2003,[1] the General Assembly

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[1] The 2003 redistricting plan was the third statewide redistricting plan adopted by the General Assembly following the 2000 decennial census. The first two

concluded that it was necessary to cross county lines in forming House District 18 so as not to dilute the voting rights of African-Americans in violation of Section 2. As the North Carolina Supreme Court recognized below, House District 18 was drawn with an African-American voting age population of 39% because past election results in North Carolina demonstrate that such a legislative voting district would present African-Americans with an opportunity to elect their candidates of choice. (Pet. App. 5a) To draw such a district, the North Carolina General Assembly joined the population of Pender County and an adjoining

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redistricting plans were struck by the North Carolina Supreme Court on the ground that they violated provisions of the North Carolina Constitution that prohibit dividing counties to form state House and Senate districts (the "whole county" provisions). *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). Construing these state constitutional provisions, the North Carolina Supreme Court has concluded that counties may be divided and county lines crossed in order to comply with the Voting Rights Act and one-man, one-vote requirements, but the crossing of county lines must be minimized for districts that are not required by the Voting Rights Act. The North Carolina General Assembly drew District 18 to comply with the *Stephenson* criteria to the maximum extent practicable and at the same time maintain District 18 as an effective African-American coalition district so as to avoid a legal challenge under Section 2. (Pet. App. 137a-139a)

county (New Hanover County) and then formed three districts within this two county grouping.[2] If the General Assembly were required to minimize the crossing of county lines (*i.e.*, keep Pender County whole and add only so much of New Hanover County as would be necessary to comply with the one-person, one-vote requirement), the maximum African-American population that could be obtained within House District 18 would not be sufficient to provide African-Americans an opportunity to elect a candidate of choice in this district.

2. In May 2004, Pender County and its county commissioners brought an action against the Governor and other state officials ("the State") in the Superior Court of Wake County, North Carolina, to challenge the General Assembly's 2003 redistricting plan. Specifically, plaintiffs asserted that House District 18 violated the "whole county" provision of the North Carolina Constitution. N.C. Const. art. II, § 5(3) (no county shall be divided in forming a state house district) (Pet. App. 127a); *see also* N.C. Const. art. II, § 3(3) (senate districts) (Pet. App. 126a). In its answer, the State asserted that it was necessary to cross

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[2] A map showing the boundaries of these three districts (District 16, 18 and 19) is set out in Petitioners' Appendix at 132a.

county lines in order to comply with Section 2 of the Voting Rights Act.[3]

Plaintiffs' claim was heard by a three-judge panel of the Superior Court. *See* N.C. Gen. Stat. § 1-267.1 (2007) (challenges to State legislative districts to be heard by a three-judge panel of the Superior Court). The parties filed cross-motions for summary judgment on the issue of whether the "configuration of House District 18 [is] required by Section 2 of the Voting Rights Act." (Pet. App. 72a) Specifically, plaintiffs argued that because African-Americans do not constitute a numerical majority in this district, the district was not required to be formed in order to comply with Section 2. The three-judge panel unanimously rejected this argument.

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[3] Consistently throughout this litigation, the State has contended that District 18 constitutes a "coalition" district (also referred to as a "crossover" district or "ability to elect" district) in which the minority group may elect its candidate of choice as a result of being joined by predictably supportive voters from outside the minority group. In contrast to a "coalition" district, an "influence" district arises when "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). The State has not and does not assert that District 18 is protected under Section 2 of the Voting Rights Act as an "influence" district.

The three-judge panel turned to the three preconditions for bringing a Section 2 claim as set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under *Gingles*, a plaintiff must show that: 1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," 2) the minority group is "politically cohesive," and 3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. The three-judge panel recognized that the Fourth Circuit had previously held in *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005), that a vote dilution claim may only be brought under Section 2 if a minority group exceeds 50% of the population of a proposed election district. The three-judge panel rejected the Fourth Circuit's conclusion that the first *Gingles* prong establishes a literal numerical threshold of 50%. Rather, the panel concluded that the first *Gingles* prong "depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district." (Pet. App. 93a) The panel opined that the proper analysis is whether the political realities of the district "make the black voters a *de facto* majority that can elect candidates of their own choosing." (Pet. App. 93a) The panel observed that the "inquiry must focus on the potential of black voters to elect representatives of their own choosing not merely on sheer numbers alone." (Pet. App. 93a)

Based upon the undisputed evidence that African-Americans could successfully elect (and had in fact done so) candidates of their choosing in House District 18, the three-judge panel entered partial summary judgment with respect to the first and second prongs of the *Gingles* test.[4] Specifically, the panel held that African-Americans were a sufficiently large and geographically compact group to form an effective majority in House District 18 and that African-Americans were politically cohesive in this district. (Pet. App. 102a-103a) Following the entry of partial summary judgment in favor of the State, plaintiffs stipulated that the white majority in Pender and New Hanover Counties voted sufficiently as a bloc to enable it usually to defeat the candidates of choice of African-Americans in the district.[5] (Pet. App. 128a-131a) With this stipulation, the three-judge panel issued

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[4] The three-judge panel also issued summary judgment against Pender County (and its commissioners to the extent they were suing in their official capacity) on the ground that the County lacked standing to sue the State. Pender County originally appealed that determination to the North Carolina Supreme Court but later withdrew its appeal. Thus, the only appellants before the North Carolina Supreme Court were three individual plaintiffs.

[5] This stipulation was supported by the expert opinion of Dr. Richard L. Engstrom who concluded that pronounced and persistent patterns of racially polarized voting exist in Pender and New Hanover Counties.

summary judgment in favor of the State. (Pet. App. 106a-120a) The panel concluded that House District 18 met all three of the *Gingles* prongs and that, based on the totality of the circumstances, House District 18 had to be drawn across county lines in order to comply with Section 2 of the Voting Rights Act. (Pet. App. 117a-118a)

3. The North Carolina Supreme Court, in a divided opinion, reversed the three-judge panel. (Pet. App. 1a-50a) The North Carolina Supreme Court noted that the only issue before it was whether the first *Gingles* precondition requires that the minority group be greater than 50% to be protected by Section 2. (Pet. App. 14a) The North Carolina Supreme Court concluded that *Gingles* imposes such a requirement. In so holding, the North Carolina Supreme Court recognized that African-Americans had the effective ability to elect candidates of their choice in House District 18. (Pet. App. 5a) Nevertheless, the North Carolina Supreme Court concluded that this Court in *Gingles* "meant [to establish] a quantitative majority" and set a threshold requirement of 50%. (Pet. App 14a) The North Carolina Supreme Court held that because Section 2 of the Voting Rights Act did not require that House District 18 be drawn so as not to dilute the vote of African-Americans in these counties, the district violated the "whole county" provision of the North Carolina Constitution by dividing county lines. The North Carolina Supreme Court ordered the State to proceed with a further round of redistricting for the

2010 election, thereby eliminating the possibility of maintaining a district with proven ability to elect an African-American candidate of choice.

Chief Justice Parker, in a dissent in which Justice Timmons-Goodson joined, opined that the majority had misconstrued both Section 2 of the Voting Rights Act and this Court's decision in *Gingles*. Chief Justice Parker noted that "the United States Supreme Court has not endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute a numerical majority." (Pet. App. 41a (Parker, C.J., dissenting)) Chief Justice Parker concluded that such a "rigid numerical majority requirement" is inconsistent with both this Court's precedent and the intent of the Voting Rights Act. (Pet. App. 42a)

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve an issue that has been before the Court, but left unresolved, in five previous opinions. *Thornburg v. Gingles*, 478 U.S. 30, 46-47 n.12 (1986); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2624 (2006). Because this Court has not yet decided this issue, the circuit courts and state courts of last resort remain intractably split.

More importantly, the present petition likely stands as the last opportunity for the Court to resolve this split before redistricting occurs as a result of the 2010 census.

If the Court does not resolve this important issue before the next census is conducted, election districts will be drawn throughout the country with different standards used in different circuits. Should this Court wait to resolve the circuit split until after the 2010 census, a substantial number of jurisdictions could be forced to undergo the arduous process of redistricting twice – once to account for new census data and a second time to draw the district lines correctly when a uniform rule is eventually established by this Court.

The answer to this question will affect the voting rights of minorities throughout the country. Potential districts that could elect minority candidates may not be drawn if redistricting authorities feel constrained by a numerical majority requirement, while other minority districts may be unnecessarily packed, often at great costs to geographic compactness, solely to assure a numerical majority.

The States and their local government subdivisions need to know the answer to this important question now. As Justice Souter observed in *LULAC*, "[a]lthough both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, the day has come to answer it." 126

S. Ct. at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part) (citations omitted). Justices Stevens, Souter and Ginsburg have noted that they would answer this question differently than did the North Carolina Supreme Court. *LULAC,* 126 S. Ct. at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting).

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

The circuit courts and state courts of last resort are split on the issue of whether a vote dilution claim may be brought under Section 2 of the Voting Rights Act when the population of minority voters constitutes less than 50% of a geographically compact area but is sufficiently numerous to elect representatives of their choice as a result of consistent crossover voting from other racial groups. On the one hand, the Fourth, Fifth, Sixth and Seventh Circuits have relied on *Gingles* to impose a numerical threshold of 50% for bringing a Section 2 claim. On the other hand, the First Circuit, the New Jersey Supreme Court and the United States Department of Justice have concluded that the language and purpose of Section 2 set no such

unyielding numerical threshold. The decision of the North Carolina Supreme Court deepens this conflict.

The Fourth, Fifth, Sixth and Seventh Circuits have held that a vote dilution claim may only be brought if a minority group constitutes greater than 50% of a proposed election district. In *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004), the Fourth Circuit held that Section 2 of the Voting Rights Act establishes "a numerical majority requirement" for vote dilution claims. The Fourth Circuit relied upon this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The *Gingles* decision establishes three preconditions that must be shown in a Section 2 claim: 1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," 2) the minority group is "politically cohesive," and 3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. In *Hall*, the Fourth Circuit rejected the plaintiffs' argument that the first *Gingles* prong is satisfied when minorities are sufficiently numerous to form an effective or functional majority as a result of consistent and reliable crossover voting from other racial groups. The Fourth Circuit reasoned that a "redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2." *Hall*, 385 F.3d at 431.

The Fifth Circuit has similarly held that the first *Gingles* prong constitutes a bright line test. *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). The Fifth Circuit concluded that *Gingles* requires "vote dilution claimants to prove that their minority group exceeds 50% of the relevant population." *Id.* The Fifth Circuit held that the plaintiff could not establish a Section 2 violation given that the plaintiff's evidence showed that the minority group would have constituted no more than 48% of the population of the proposed district. *Id.* at 851.

The Sixth Circuit, in a sharply divided en banc decision, has held that the first *Gingles* prong cannot be satisfied unless a *single* minority would constitute more than 50% of the proposed district. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). In *Nixon*, the Sixth Circuit concluded that Section 2 requires that the minority group be sufficiently numerous and geographically compact to constitute a majority without consideration of crossover or coalition voting. *Id.* at 1391. Thus, the Sixth Circuit has made clear that a minority group that falls short of the 50% mark in a district cannot demonstrate that it has the ability to elect a candidate of its choice.

Like the Fourth, Fifth and Sixth Circuits, the Seventh Circuit has adopted a 50% rule with respect to the first *Gingles* prong. *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988). In *McNeil*, the Seventh Circuit concluded that the first *Gingles* prong

constitutes a "bright-line requirement" and held that "no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority." *Id.* at 945 (quotations omitted); *see also id.* at 943 n.9 ("Cross-over voting is to be considered only after the *Gingles* prerequisites are met.").

The North Carolina Supreme Court adopted the reasoning of these circuits. Relying upon the Seventh Circuit's decision, the North Carolina Supreme Court concluded that a "bright line rule for the first *Gingles* precondition 'promotes ease of application without distorting the statute or the intent underlying it.'" (Pet. App. 23a (quoting *McNeil*, 851 F.2d at 942)) Citing the Fourth Circuit's decision, the North Carolina Supreme Court stated that "'[w]hen a minority group lacks a numerical majority in a district, 'the ability to elect candidates of their own choice was never within the [minority group's] grasp.'" (Pet. App. 22a (quoting *Hall*, 385 F.3d at 430)) Despite acknowledging the ability of African-Americans in District 18 to elect their candidate of choice, the North Carolina Supreme Court held that the first *Gingles* prong constitutes a quantitative threshold that cannot be met unless a minority exceeds 50% in the proposed district.

In contrast to the North Carolina Supreme Court and these four circuit courts, the First Circuit, as well as the New Jersey Supreme Court and the United States Department of Justice, have concluded that the

"majority" requirement of the first *Gingles* prong should not be read as a literal, mathematical requirement of 50%. In *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), the First Circuit, in an en banc decision, specifically noted that "several Supreme Court opinions after *Gingles* have offered the prospect, or at least clearly reserved the possibility, that *Gingles'* first precondition – that a racial minority must be able to constitute a 'majority' in a single-member district – could extend to a group that was a numerical minority but had predictable cross-over support from other groups." *Id.* at 11. In *Metts*, the district court dismissed plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiffs failed to show that a district could be created in which African-Americans would constitute more than 50% of the district. *Metts v. Almond,* 217 F. Supp. 2d 252 (D.R.I. 2002), *rev'd sub nom. Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc). The First Circuit reversed the district court and expressly held that a minority group that comprises less than 50% of a district may satisfy the first *Gingles* prong if the minority group has the ability to elect its candidate of choice. 363 F.3d at 12.

Like the First Circuit, the New Jersey Supreme Court has held that Section 2 protects minorities from vote dilution even if the minority group falls short of a majority in a specific district. In *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003), New Jersey adopted a legislative redistricting plan

that divided Newark and Jersey City into three districts each. Plaintiffs, who wanted each city divided into just two districts, sued under a state constitutional provision that required keeping municipalities intact to the greatest extent possible. In defense, the State argued that these six districts were all mandated by Section 2 of the Voting Rights Act, even though four of them were coalition districts that were less than 50% black and less than 50% Latino. The Supreme Court of New Jersey agreed with the State, held that packing minority voters into a smaller number of majority-black or majority-Latino districts would violate the Voting Rights Act, and concluded that Congress never "intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters." 828 A.2d at 853 (citation and internal quotation marks omitted).

In the past, the United States Department of Justice has urged the Court to grant certiorari and resolve this issue of "recurring significance in the administration and enforcement of Section 2." Brief of the United States as Amicus Curiae at 6, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, No. 98-1987 (U.S. Dec. 1999). The Department has argued that this Court should reject an interpretation of Section 2 that imposes a literal, numerical requirement of 50%. *Id.* The United States has consistently advocated that "Section 2 and *Gingles* do not impose an absolute requirement that a minority be shown to constitute a majority in a single-member district." *Id.* The United

States has recently reiterated that it has steadfastly argued that "a 'flat 50% rule' [is] inappropriate when the minority group was 'compact, politically cohesive, and substantial in size yet just short of a majority.'" Brief of the United States as Amicus Curiae, *League of United Latin American Citizens v. Perry*, No. 05-204, 2006 U.S. S. Ct. Briefs LEXIS 192, **34 (U.S. Feb. 1, 2006) (quoting Brief of the United States as Amicus Curiae at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.*).

The conflict among the circuits is particularly problematic given that decisions of three-judge courts frequently diverge within a circuit. In Ohio, for example, the Ohio legislature must choose whether it will follow Sixth Circuit precedent or follow a directive by a three-judge court. *Compare Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (50% threshold must be met by a single minority to trigger Section 2), *with Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (three judge court) ("We cannot agree with the defendants that a government may with impunity divide a politically cohesive, geographically compact minority population between two single member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed a single district's population divided by two.").

In New York, the New York legislature must choose whether to follow a three-judge court from the Southern District of New York or a three-judge court

from the Eastern District of New York. *Compare Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 384 (S.D.N.Y. 2004) (three-judge court) (concluding that a "bright-line rule effectuates" goals of Voting Rights Act), *aff'd*, 453 U.S. 997 (2004), *with Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) ("there is no bright-line rule for discerning an appropriate VAP level within a district that passes Voting Rights Act muster").

The doubt and uncertainty that has plagued redistricting is perhaps best reflected by the conflicting decisions arising within the Eleventh Circuit. In *Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997), the Eleventh Circuit affirmed the district court's determination that the plaintiffs had failed to "meet the first *Gingles* precondition." *Id.* at 1568. In *Negron*, the plaintiffs' proposed plan created three districts with Hispanics constituting 48.45%, 47.58% and 41.17% of the citizen voting age population for those districts. *Id.* at 1567. The Eleventh Circuit noted that the plaintiffs' plan "fails to create any districts where Hispanics constitute a majority of potential voters." *Id.* at 1571. The Eleventh Circuit held that the plaintiffs had therefore failed to satisfy the first *Gingles* prong.[6]

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[6] In *Negron*, the record established that only 50% of the Hispanic residents of Miami Beach were citizens, thus making citizenship a relevant factor in the *Gingles* analysis

The *Negron* decision has engendered significant confusion within the Eleventh Circuit. Although the holding of *Negron* appears to stand for the proposition that a minority group must exceed 50% to satisfy the first *Gingles* prong, the language of the decision emphasizes that the legal standard is whether the minority group is "sufficiently large" or "numerous." *Id.* at 1566-67, 1569. As a result, it is understandable that a subsequent panel of the Eleventh Circuit has stated that the circuit has not yet resolved whether the first *Gingles* prong stands as a 50% numerical threshold. *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004). More recently, a panel of the Eleventh Circuit, in contrast to the *Negron* decision, has held that crossover voting must be considered in determining whether a minority group meets the first *Gingles* prong. *Thompson v. Glades County Bd. of County Comm'rs*, 493 F.3d 1253, 1264 (11th Cir. 2007) (in holding that proposed district

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in determining the ability of the Hispanic community to elect a candidate of choice in that only citizens can vote. 113 F.3d at 1569. Citing *Negron*, the North Carolina Supreme Court concluded that the proper statistic for determining the first *Gingles* prong is voting age as refined by citizenship. (Pet. App. 17a) Because the overwhelming majority of African-Americans residing in eastern North Carolina are citizens, whether voting age population or citizen voting age population is used in analyzing House District 18 is essentially immaterial.

consisting of a bare majority of African-Americans – 50.23% – satisfies the first *Gingles* prong, court recognized that even a minority too small to constitute a majority in a single-member district is protected by Section 2 if there is sufficient crossover voting that would allow the minority group to elect its candidate of choice). Moreover, the rationale of *Negron* has been rejected by a three-judge court sitting in the Southern District of Florida. In *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1321-22 & n.56 (S.D. Fla. 2002) (three-judge court), the court noted: "we doubt [the use of the word 'majority' in the first *Gingles* prong] was intended as a literal, mathematical requirement." The court further concluded that the *Gingles* prongs must not be read as establishing a "bright-line test." *Id.* at 1322.

The issue set out in the petition has percolated in the lower courts for two decades and has not been definitively resolved. The present split of authority has resulted in inconsistent outcomes and has hindered the efforts of state and local governments to comply with the Voting Rights Act. The Court should grant certiorari to resolve this split of authority.

II. THE DECISION OF THE NORTH CAROLINA SUPREME COURT RAISES AN IMPORTANT ISSUE OF FEDERAL LAW.

Both Congress and the President have repeatedly recognized that the Voting Rights Act is "one of the

most important pieces of legislation in our Nation's history." 152 Cong. Rec. S8781 (daily ed. Aug. 3, 2006) (statement of President George W. Bush to Congress); *see* 152 Cong. Rec. S8372 (daily ed. July 27, 2006) (remarks of Sen. Leahy) ("The Voting Rights Act is one of the most important laws Congress has ever passed."). This Court has also emphasized that the right to vote is one of the most important liberties held by the citizens of a democracy. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (the right to vote stands as "the most basic of political rights"); *see also Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (right to vote "is a fundamental matter in a free and democratic society"). The Voting Rights Act was intended by Congress to protect this right and to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Accordingly, the proper and consistent application of this Act is vital to our Nation and to the individual rights of its citizens.

The question presented by this petition is an important issue which must be resolved if the Voting Rights Act is to be applied consistently throughout the country and in a manner that effectuates its stated purpose. Over the last two decades, the present issue has been before the Court on five separate occasions. In *Gingles*, this Court left open the issue of whether "a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district" could still satisfy the

requirements of a Section 2 vote dilution claim. *Gingles*, 478 U.S. at 46 n.12. Seven years later in *Growe*, this Court noted that although the issue had not been resolved in *Gingles*, the appeal did not present a good vehicle for resolving the issue in that it had not been argued before the district court. *Growe*, 507 U.S. at 41 n.5. That same term, this Court in *Voinovich* stated that it "need not decide how *Gingles'* first factor might apply" when a minority group constitutes less than 50% of a proposed district, because the plaintiffs had failed to satisfy the third *Gingles* prong. *Voinovich*, 507 U.S. at 154, 158. In *De Grandy*, this Court assumed, without deciding, that "even if [a minority group is] not an absolute majority . . . in the [proposed] districts, the first *Gingles* condition has been satisfied." *De Grandy*, 512 U.S. at 1009. Finally, last year in *LULAC*, this Court again addressed, but failed to resolve, this issue: "As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population." *LULAC*, 126 S. Ct. at 2624.

Unlike *LULAC, De Grandy, Voinovich and Growe*, the present petition presents a good vehicle for resolving this important issue. The only issue in this action is the meaning of the first prong of *Gingles*. The remaining two prongs of *Gingles* are not in dispute. Based on the plenary, uncontested evidence presented by the State, the three-judge panel found that the African-American voters in Pender and New Hanover

Counties are politically cohesive. In addition, the panel found and the plaintiffs stipulated that racially polarized voting exists in the two counties so that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

As the North Carolina Supreme Court recognized, "[o]nly the first *Gingles* precondition is at issue in this appeal." (Pet. App. 14a) The North Carolina Supreme Court articulated the issue before it as follows:

> We must determine whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (*i.e.*, greater than 50 percent), or whether it meant instead a minority group sufficiently large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups.

(Pet. App. 14a)

The district at issue has, since its creation, elected an African-American to the North Carolina General Assembly. The decision below puts in jeopardy the ability of African-Americans within this district to elect a candidate of their choice. Moreover, the current split of authority leaves unresolved the rights of minority voters throughout the country and leaves States floundering in their efforts to comply with Section 2 of the Voting Rights Act.

III. THE PRESENT APPEAL IS LIKELY THE LAST OPPORTUNITY FOR THIS COURT TO RESOLVE THIS IMPORTANT ISSUE BEFORE REDISTRICTING OCCURS AS A RESULT OF THE 2010 CENSUS.

In 2010, the United States Census Bureau will conduct its next decennial census of the country. *See* 2 U.S.C. § 2a (2000). That data will result in election districts for local, state and federal offices being redrawn. The present petition likely presents the last opportunity for this Court to resolve this issue before the next round of redistricting.

Should this important issue not be resolved prior to 2010, the criteria used by States to draw district lines will be different in the Fourth, Fifth, Sixth and Seventh Circuits from those used in the First Circuit. States and localities in the remaining circuits stand in the unenviable position of simply guessing which side of the split their circuit will ultimately adopt. States in these circuits face protracted litigation regardless of which side of the split they choose to follow. Moreover, if this Court were to delay resolving this issue until after redistricting is complete, the Court's decision, regardless of how the split is resolved, will result in district lines being redrawn in a substantial number of States. More importantly, if this Court were to hold that minority groups need not reach a numerical threshold of 50% to be protected against vote dilution

under Section 2, any delay in resolving this issue will result in district lines being drawn that do not fully and adequately protect minority voting rights.

The issue before the Court has a substantial impact upon state and local governments, minority voters and political candidates. This Court should directly address this issue before jurisdictions throughout the country embark upon the next round of redistricting.

IV. THE NORTH CAROLINA SUPREME COURT ERRED IN CONCLUDING THAT A MINORITY POPULATION MUST EXCEED 50% TO BE PROTECTED AGAINST VOTE DILUTION UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

This Court should also grant certiorari because the North Carolina Supreme Court erred in holding that Section 2 only protects minorities against vote dilution if the minority population in a geographically compact area exceeds 50%. The North Carolina Supreme Court's construction of the Voting Rights Act is contrary to the language of the Act and ignores this Court's prior decisions.

In *LULAC*, Justice Kennedy, writing for a plurality of the Court, assumed that a minority group that comprises less than 50% of a district's population could establish a vote dilution claim under Section 2.

LULAC, 126 S. Ct. at 2624. That assumption is well founded.

The text of Section 2 does not itself require that minorities constitute 50% of a district in order to be protected against vote dilution. Moreover, the three prongs of *Gingles* must be read and construed in light of their function – to determine whether racial minorities have an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2000). As this Court noted in *Voinovich*, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. at 158. The "bright line" 50% rule adopted by the North Carolina Supreme Court constitutes such a mechanical application. The Voting Rights Act compels courts to take a "functional view of the political process." *Gingles*, 478 U.S. at 48 n.15. "The danger of a 'one-size-fits-all' bright-line rule is its unyielding rigidity and insensitivity to the particular facts of a voting rights case." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 561 (9th Cir. 1998) (Hawkins, J., concurring in part and dissenting in part); *see also* Note, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 326 (2005) ("the aim of *Gingles's* first prong can be vindicated without slavishly adhering to the numerical rule").

The decision of the North Carolina Supreme Court focuses upon the literal language used by this Court in *Gingles* to describe the first precondition for bringing

a vote dilution claim. (Pet. App. 7a (stating that *Gingles* requires that the minority group "constitute a majority in a single-member district")) In *De Grandy*, however, the Court rephrased the first *Gingles* prong as requiring the existence of "a sufficiently large minority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008; *see also id.* at 1020 (recognizing that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice"). As one commentator has observed, "the 'majority' requirement in the first prong is properly viewed as requiring an effective voting majority capable of electing a minority-preferred candidate, rather than a literal mathematical majority of the population." Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2606 (2004).

This Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), further underscores that the decision of the North Carolina Supreme Court is wrong. In *Georgia v. Ashcroft*, the Georgia legislature reduced the number of "safe" minority districts in order to increase the number of coalition and influence districts. This Court held that such an approach was not necessarily a retrogressive violation of Section 5 of the Voting Rights Act, 42 U.S.C.S. § 1973c (LexisNexis Supp. 2007) (Pet. App. 123a-125a). Although Section

2 and Section 5 "combat different evils," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997), this Court's unanimous recognition that coalition voting is important to assessing minority voting power is highly instructive. In *Georgia v. Ashcroft*, all nine justices agreed that it is not necessarily retrogressive to reduce the number of districts in which minorities exceed 50% of the voting age population in order to increase the number of coalition districts. 539 U.S. at 490; *id.* at 492 (Souter, J., dissenting). As one commentator has observed, "the Court's decision moves the Voting Rights Act away from a talismanic fifty-percent mark" and should be "extend[ed] to section 2 vote dilution cases." *The Supreme Court, 2002 Term: Leading Cases*,117 Harv. L. Rev. 469, 474 (2003). "[I]t would make little sense for courts to preclear a redistricting plan that divides one majority-minority district into two coalitional districts in a state covered by section 5, but then, in a noncovered state, reject a redistricting plan that creates two coalitional districts rather than one majority-minority district." Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. at 2601-02.

Georgia v. Ashcroft is a practical recognition that "the ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine." 539 U.S. at 480. This Court's recognition of the significance of coalition districts in determining minority voting strength in the context of Section 5's stricter retrogression standard undermines

the conclusion of the North Carolina Supreme Court that a vote dilution claim may only be brought under Section 2 if a numerical threshold of 50% is met.

This Court should hold that "a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage." *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part). "[T]he '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry." *Id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

Grayson G. Kelley
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Alexander McC. Peters
Special Deputy Attorney General

Susan K. Nichols
Special Deputy Attorney General

November 2007

*Counsel of Record

APPENDIX

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***Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, North Carolina Supreme Ct., Aug. 24, 2007**

SUPREME COURT OF NORTH CAROLINA

No. 103A06

FILED: 24 AUGUST 2007

PENDER COUNTY, et al.
v.
GARY BARTLETT, et al.

361 N.C. 491; 649 S.E.2d 364; 2007 N.C. LEXIS 816

COUNSEL:
Carl W. Thurman III for plaintiff-appellants Dwight Strickland, David Williams, and Stephen Holland, in their individual capacities.

Roy Cooper, Attorney General, by Tiare B. Smiley and Alexander McC. Peters, Special Deputy Attorneys General, for defendant-appellees.

Center for Civil Rights, University of North Carolina School of Law, by Anita S. Earls, for Cindy Moore, Milford Farrior, and Mary Jordan, amici curiae.

JUDGES:
EDMUNDS, Justice. Justice HUDSON did not participate in the consideration or decision of this case.

***Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, North Carolina Supreme Ct., Aug. 24, 2007**

Chief Justice PARKER dissenting. Justice TIMMONS-GOODSON dissenting.

OPINION BY: EDMUNDS

OPINION

[*493] **[**365]** Appeal pursuant to N.C.G.S. § 120-2.5 from an order entered 2 December 2005 and a judgment entered 9 January 2006 by a three-judge panel of the Superior Court, Wake County appointed by the Chief Justice under N.C.G.S. 1-267.1. Heard in the Supreme Court 13 September 2006.

EDMUNDS, Justice.

In this case, we consider whether the current geographic configuration and racial composition of North Carolina House District 18 as established by the North Carolina General Assembly was required by Section 2 of the **[**366]** Voting Rights Act of 1965.[1] We conclude that the Voting Rights Act did not mandate the creation **[***2]** of a Section 2 "crossover" district and that House District 18 violates the Whole County Provision of the Constitution of North Carolina. Accordingly, we reverse the decision of the three-judge panel below.

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[1] House District 16 also lies in Pender County and perforce is affected by our holding today. However, we shall follow the lead of the parties and the three-judge panel and focus solely on House District 18.

***Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, North Carolina Supreme Ct., Aug. 24, 2007**

The General Assembly's redistricting powers are confined and directed in several respects. In the first instance, redistricting "must comport with federal law." *Stephenson v. Bartlett*, 355 N.C. 354, 363, 562 S.E.2d 377, 384 *(Stephenson I)*, *stay denied*, 535 U.S. 1301, 122 S. Ct. 1751, 152 L. Ed. 2d 1015 (Rehnquist, Circuit Justice 2002). In addition, the Constitution of North Carolina enumerates several limitations on the General Assembly's redistricting authority. *See* N.C. Const. art. II, §§ 3, *5*. Those constitutional limitations are binding upon the General Assembly "except to the extent superseded by federal law." *Stephenson I*, 355 N.C. at 372, 562 S.E.2d at 390. None of the express limitations on redistricting in our State Constitution is facially inconsistent with federal law. *Id.* at 370, 562 S.E.2d at 389.

Two **[***3]** constitutional sections limiting redistricting, collectively known as the "Whole County Provision" (WCP), provide "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id.* art. II, § 5(3). Although federal law is supreme, when "the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible." *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. Moreover, "the WCP cannot be applied in isolation or in a manner that fails to comport with

other requirements of the State Constitution." *Id.* at 376, 562 S.E.2d at 392.

[*494] Based upon data from the 2000 decennial census, an ideal single-member North Carolina House district holds 67,078 citizens. According to that census, Pender County had 41,082 residents, or 61 percent of the population required to support its own House district. That census also indicated that adjoining New Hanover County had 160,307 residents, or 239 percent of the population needed for a single House district. Combining these two counties provided **[***4]** the population for approximately three House districts.

The district in question, House District 18, was drawn after this Court determined that earlier redistricting efforts by the North Carolina General Assembly failed to meet federal and state standards. In *Stephenson I*, we held that the General Assembly's 2001 state House and Senate legislative redistricting plans violated the State Constitution's WCP. 355 N.C. at 375, 562 S.E.2d at 392. Similarly, in *Stephenson II*, this Court held that the General Assembly's proposed 2002 redistricting plans were also constitutionally deficient. *Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) (*Stephenson II*). In the 2003 House redistricting plan promulgated after the two *Stephenson* opinions, Pender County was divided between two legislative districts, House District 16 and House District 18. Act of Nov. 25, 2003, ch. 434, secs. 1-2, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1313-92. Both districts encompass portions of

Pender and New Hanover Counties and thus cross county lines. *Id.*, sec. 1 at 1327-30.

The General Assembly drew House District 18 to meet the requirements of Section 2 of the Voting Rights Act of 1965 (VRA), **[***5]** codified as amended at 42 U.S.C. § 1973 (2003). Section 2 of the VRA, which we discuss in detail below, "generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 385 (citing 42 U.S.C. §§ 1973(a), (b); *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, **[**367]** 92 L. Ed. 2d 25, 42 (1986)). Past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates. Accordingly, in the 2003 House redistricting plan, the General Assembly fashioned House District 18 with a total African-American population of 42.89 percent, and an African-American voting age population **[*495]** of 39.36 percent. Defendants refer to House District 18 as an "effective black voting district," with a sufficient African-American population to elect representatives **[***6]** of their choice.

***Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364, North Carolina Supreme Ct., Aug. 24, 2007**

On 14 May 2004, plaintiffs brought the instant action. Pender County was a named plaintiff, as were five persons suing both as individuals and in their official capacities as county commissioners of Pender County. Defendants, consisting of the Executive Director and members of the North Carolina Board of Elections, the then co-Speakers of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Attorney General, and the Governor of the State of North Carolina, were all sued in their official capacities. In their complaint, plaintiffs contended that the 2003 House redistricting plan violated the WCP by dividing Pender County into House District 16 and House District 18. Defendants responded that the division of Pender County was required by Section 2 of the VRA, which trumped the State Constitution.

Pursuant to N.C.G.S. § 1-267.1(b), on 24 May 2004 the Chief Justice appointed a three-judge panel to hear this redistricting challenge. Plaintiffs first sought a preliminary injunction to enjoin defendants from proceeding with the 2004 primary and general elections. The panel denied the injunction. On 25 February 2005, the parties [***7] filed cross-motions for summary judgment, followed by initial and amended stipulations of fact.

On 2 December 2005, the three-judge panel entered an order allowing partial summary judgment in favor of defendants and denying summary judgment for plaintiffs. In its order, the panel determined that

plaintiff Pender County and its commissioners lacked standing to sue in their official capacity, although the commissioner-plaintiffs could proceed in their individual capacities. Plaintiffs do not appeal this determination. Next, the panel examined House District 18 in light of the United States Supreme Court's decision in *Thornburg v. Gingles*, the leading case interpreting Section 2. *Gingles* set out three "necessary preconditions" a plaintiff is required to demonstrate before he or she can establish that a legislative district must be drawn to comply with Section 2 or that an existing district violates Section 2. 478 U.S. at 50, 92 L. Ed. 2d at 46. These preconditions require a plaintiff to show that: (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive" and thus **[***8]** votes as a bloc; and (3) the majority **[*496]** population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51, 92 L. Ed. 2d at 46-47. By demonstrating these three preconditions, a plaintiff can show that a particular legislative district may "impair minority voters' ability to elect representatives of their choice." *Id.* at 50, 92 L. Ed. 2d at 46.

As the three-judge panel noted, the procedural posture of the case at bar differs from a typical Section 2 case. Here, defendants drew House District 18 as a preemptive measure against the possibility that a

lawsuit might be filed challenging the absence of a Section 2 district in southeastern North Carolina. Plaintiffs claim that the current configuration of House District 18 was not required by Section 2 and that the District violates the WCP, thus placing defendants in the unusual position of having to defend a legislative district by proving that a Section 2 violation would have occurred if current House District 18 had not been created. Accordingly, defendants here must bear the burden, normally borne by plaintiffs, of establishing the *Gingles* preconditions. If they succeed, defendants **[***9]** can demonstrate that the drawing of House District 18 was **[**368]** required by Section 2, obviating the need to comply with the WCP.

The three-judge panel held that House District 18 met the first two *Gingles* preconditions but determined that material issues of fact remained as to whether the third precondition had been satisfied. Because the panel did not reach the issue of whether House District 18 met the third precondition, it declined to consider whether the district also met the "totality of circumstances" test prescribed by *Gingles* and Section 2 of the VRA. *Gingles*, 478 U.S. at 43, 92 L. Ed. 2d at 42 (quoting 42 U.S.C. § 1973(b)) (explaining that Section 2 is violated when the "totality of the circumstances" establishes that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

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Following the order of partial summary judgment, the parties on 9 January 2006 filed another joint stipulation that the Caucasian majority voted sufficiently as a bloc to enable it usually to defeat the African-American minority's preferred candidate. Through this stipulation, plaintiffs conceded **[***10]** House District 18 met the third *Gingles* precondition. However, plaintiffs did not stipulate that House District 18 was required by Section 2 of the VRA.

[*497] With the issues of material fact resolved as to the third precondition, the three-judge panel issued its final summary judgment order on 9 January 2006. The panel concluded House District 18 met all three of the *Gingles* threshold preconditions and, based on the totality of circumstances, the creation of House District 18 as a crossover district (i.e., one where the minority group enjoys reliable support from members of the majority who "cross over" racial or ethnic lines to vote with the minority and elect the minority's candidate) was required by Section 2 of the VRA. Accordingly, the panel held that House District 18 could split Pender County and that the district complied, to the maximum extent practicable, with the legal requirements of the WCP, as set out in *Stephenson I.*

Three of the five individual plaintiffs appealed to this Court pursuant to N.C.G.S. § 120-2.5. Although neither party has raised the issue of jurisdiction, we note that this statute authorizes direct appeal to this

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Court "from any final order or judgment of a court [***11] declaring unconstitutional or otherwise invalid in whole or in part and for any reason any act of the General Assembly that apportions or redistricts State legislative or congressional districts." N.C.G.S. § 120-2.5 (2005). While the three-judge panel did not declare the 2003 House redistricting plan unconstitutional or invalid, we do not believe the General Assembly intended to limit appeals of the findings of such a three-judge panel to one type of outcome only. This view is supported by a later part of the same session law that enacted § 120-2.5, which provides that the appeal provision applies to "any action of a court *affecting the validity* of an act apportioning or redistricting State legislative or congressional districts." Ch. 434, sec. 16, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) at 1419 (emphasis added). Accordingly, we interpret N.C.G.S. § 120-2.5 to mean that any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to N.C.G.S. § 1-267.1 is direct to this Court. We now consider whether the VRA required that House District 18 be drawn in its current form as a crossover district.

An order allowing summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). [***12] Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2005). An act of the General

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Assembly is accorded a "strong presumption of constitutionality" and is "presumed valid *unless it conflicts with the Constitution.*" *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam).

[*498] Section 2 of the VRA forbids any "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973(a) **[**369]** (2003). A denial or abridgement of the right to vote in violation of Section 2 occurs when:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process **[***13]** and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 1973(b) (2003). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by minority voters to elect their preferred representatives. *Gingles*, 478 U.S. at 47, 92 L. Ed. 2d at 44.

Consequently, Section 2 prohibits the dilution, on account of race or color, of a minority citizen's opportunity to participate in the political process and to elect representatives of his or her choice. *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 385. Although the phrase "vote dilution" does not appear in Section 2, the United States Supreme Court has provided guidance on this issue. Vote dilution of a racial minority group can occur "by the dispersal of blacks into districts in which they constitute an ineffective **[***14]** minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11, 92 L. Ed. 2d at 44 n.11. "The phrase 'vote dilution,' in the legal sense, simply refers to the impermissible discriminatory effect that a . . . districting plan has when it operates 'to cancel out or minimize the voting strength of racial groups.'" *Id.* at 87, 92 L. Ed. 2d at 70 (O'Connor, J., concurring) (quoting *White v. Regester*, 412 U.S. 755, 765, 93 S. Ct. 2332, 37 L. Ed. 2d 314, 324 (1973)); *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 359, 120 S. Ct. 866, 145 L. Ed. 2d 845, 875 (2000) (Souter, J., concurring in part and dissenting **[*499]** in part) ("The principal concept of diminished voting strength

recognized as actionable under our cases is vote dilution, defined as a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy.").

Although courts ultimately apply a totality of the circumstances test to determine whether a practice results in a denial or abridgement of the right to vote, 42 U.S.C. § 1973(b), a plaintiff bringing a claim under Section 2 **[***15]** must first establish the three *Gingles* threshold preconditions. In the case at bar, plaintiffs argue, and defendants do not dispute, that these three preconditions must exist before the General Assembly is required to draw a legislative district pursuant to Section 2. Failure to sustain any one of the *Gingles* preconditions means that the General Assembly is not required to create a legislative district pursuant to Section 2 to ensure that the votes of the minority are not diluted. *See Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 122 L. Ed. 2d 500, 514 (1993).

While *Gingles* construed Section 2 in the context of a lawsuit concerning dilution in a multi-member legislative district, the Supreme Court subsequently applied the *Gingles* preconditions to single-member legislative districts. "[A] claim of vote dilution in a single-member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district." *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S. Ct. 2647, 129 L.

Ed. 2d 775, 788 (1994) (citing *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075, 122 L. Ed. 2d 388, 403-04 (1993)). Thus, the *Gingles* preconditions must be found before Section 2 requires the General Assembly to **[***16]** create a single-member district on behalf of a minority group. In other words, the existing configuration and makeup of House District 18 was **[**370]** not required by Section 2 unless all three *Gingles* preconditions were established.

Only the first *Gingles* precondition is at issue in this appeal. The narrow question before us is whether this precondition, that a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46, requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition. We must determine whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (i.e., greater than 50 percent), or whether it meant instead a minority group sufficiently **[*500]** large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups. The Supreme Court explicitly left open this question in *Gingles*, 478 U.S. at 46 n.12, 92 L. Ed. 2d at 44 n.12, and has not answered it in several cases since. **[***17]** *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2647-48, 165 L. Ed. 2d 609, 672-73 (2006)

(Souter, J., concurring in part and dissenting in part); *De Grandy*, 512 U.S. at 1008-09, 129 L. Ed. 2d at 789-90; *Voinovich*, 507 U.S. at 154, 122 L. Ed. 2d at 511; *Growe*, 507 U.S. at 41 n.5, 122 L. Ed. 2d at 404 n.5.

Before we can answer that question, however, we must determine "which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone" for the first *Gingles* precondition. *De Grandy*, 512 U.S. at 1008, 129 L. Ed. 2d at 789. We cannot discuss the terms "minority" and "majority" in the context of a redistricting case without knowing what population we are considering. In other words, a "majority" or "minority" of *what*? Are we including the entire population of the minority group in the geographic area or are we limiting consideration to a smaller subset of that minority population? Although the United States Supreme Court has left open this question as well, *id.* at 1008-09, 129 L. Ed. 2d at 789-90, dictum in *Perry* from a unanimous Court indicates a majority should be determined by the number of minority citizens of voting age, not by its total [***18] population: "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of *§ 2* because only eligible voters affect a group's opportunity to elect candidates." *Perry*, 126 S. Ct. at 2616, 165 L. Ed. 2d at 638.

In addition, the plain language of Section 2 indicates citizenship should be taken into account in

that the statute prohibits any "qualification or prerequisite to voting . . . which results in a denial or abridgement of the right of any *citizen of the United States* to vote on account of race." 42 U.S.C. § 1973(a) (emphasis added). As *Gingles* explained:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters *possess the potential to elect representatives* in the absence of the challenged structure **[*501]** or practice, they cannot claim to have been injured by that structure or practice.

478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17 (emphasis added). *Gingles* **[***19]** "repeatedly makes reference to effective voting majorities, rather than raw population totals, as the touchstone for" determining the first precondition. *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989), *overruled in part on other grounds*, *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991). "The *raison d'etre* of [*Gingles*] and of amended § 2 is to facilitate participation by minorities in our political processes, by preventing dilution of their votes. . . . It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls." *Campos v. City of Houston*,

113 F.3d 544, 548 (5th Cir. 1997) (quotation omitted). Because **[**371]** only voting age citizens of the United States possess the ability to elect candidates, we hold that the "proper statistic" for deciding whether a minority group can meet the first *Gingles* precondition is "voting age population as refined by citizenship." *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *see also Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen **[***20]** voting-age population is the basis for determining equality of voting power that best comports with the policy of [Section 2]."), *cert. denied sub nom. Bialczak v. Barnett*, 524 U.S. 954, 118 S. Ct. 2372, 141 L. Ed. 2d 740 (1998).

We now return to the critical question on appeal, whether the "sufficiently large and geographically compact" minority population must constitute a numerical majority of citizens of voting age in order to satisfy the first *Gingles* precondition. As we undertake this analysis, we are mindful of at least four distinct types of legislative districts: (1) "majority-minority" districts, (2) "coalition" districts, (3) "crossover" districts, and (4) "influence" districts. A majority-minority district is one "in which a majority of the population is a member of a specific minority group." *Voinovich*, 507 U.S. at 149, 122 L. Ed. 2d at 508. Majority-minority districts are often called "safe" districts for the minority because the minority group voters can vote as a bloc to elect the candidates of their choice without relying on voters of other races.

By contrast, in the other types of legislative districts, the predominant minority group cannot consistently elect its candidate of choice **[***21]** without the assistance of other racial groups. Absent such **[*502]** help, even if every eligible member of the minority group voted for a single candidate, that candidate would not be assured of electoral success. Thus, a coalition district is one in which a minority group joins with voters from at least one other minority group to elect a candidate. *De Grandy*, 512 U.S. at 1020, 129 L. Ed. 2d at 796; *see also Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 904 (D. Ariz. 2005) ("A coalition district is one in which two separate minority groups allege that a district could be formed in which they could join forces to elect a representative."). In a crossover district, a minority group has "support from a limited but reliable white crossover vote." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 376 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004). The terms "coalition" district and "crossover" district are sometimes used interchangeably, but we distinguish them here because the former refers to two or more minority groups combining forces to elect a candidate, while the latter refers to a minority group gaining support **[***22]** from voters in the dominant racial majority group. Finally, an influence district is one in which a minority group is merely large enough to influence the election of candidates but too small to

determine the outcome. *Georgia v. Ashcroft*, 539 U.S. 461, 470, 123 S. Ct. 2498, 156 L. Ed. 2d 428, 445 (2003) (defining an influence district as one in which a minority group "would be able to exert a significant--if not decisive--force in the election process").

Plaintiffs contend that a minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group. They point to the wording of the first *Gingles* precondition, which says a minority group must be "sufficiently large and geographically compact to constitute a *majority* in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46 (emphasis added), and claim this language permits only majority-minority districts to be formed in response to a Section 2 claim. Defendants respond that the language of both *Gingles* and Section 2 allows for other types of legislative districts, such as coalition, **[***23]** crossover, and influence districts. House District 18, which defendants term an "effective minority district," functions as a single-member crossover district in which the total African-American voting age population of 39.36 percent needs to draw votes from a Caucasian majority to elect the candidate of its choice. Defendants contend such a crossover district is permitted by Section 2 and *Gingles*.

[*503] [372]** Our analysis leads us to the conclusion that plaintiffs' position is both more logical

and more readily applicable in practice. As noted above, while *Gingles* addresses multi-member districts, its analysis also applies to single-member districts. *De Grandy*, 512 U.S. at 1006-07, 129 L. Ed. 2d at 788. The first *Gingles* precondition is premised on initial proof that a single-member district could be constructed with a majority of minority voters. *Gingles*, 478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17. *Gingles* further states that the single-member district "is generally the appropriate standard against which to measure minority group potential to elect" candidates in a multi-member district. *Id.* In light of *Gingles*' use of a numerical majority of a minority group's voters to calibrate the minority's [***24] ability to elect its candidate in a multi-member district, we see no reason to use a quantity less than a numerical majority as the determinant in a single-member district. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge panel) ("The concerns animating the *Gingles* electoral majority precondition for multi-member cases--concerns of proof and relief--reside equally in the single-member context.").

Although the United States Supreme Court has left open this issue, the majority of federal circuit courts confronting the question have concluded that, when a district must be created pursuant to Section 2, it must be a majority-minority district. *See, e.g., Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004) (holding "*Gingles* establishes a numerical majority requirement

for all Section 2 claims"), *cert. denied*, 544 U.S. 961, 125 S. Ct. 1725, 161 L. Ed. 2d 602 (2005); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) (holding "we reject the appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population"), *cert. denied*, 528 U.S. 1114, 120 S. Ct. 931, 145 L. Ed. 2d 811 (2000); *Negron*, 113 F.3d at 1571 (11th Cir.) (plaintiffs **[***25]** failed to establish first *Gingles* precondition when Hispanics did not "constitute a majority of potential voters")[2]; *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting that "satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible"), *cert. denied sub nom.* **[*504]** *Colorado v. Sanchez*, 520 U.S. 1229, 117 S. Ct. 1820, 137 L. Ed. 2d 1028 (1997); *McNeil v. Springfield*

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[2] Despite the holding in *Negron*, a later Eleventh Circuit case purports in a footnote to "leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim." *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004). We note without further comment an Eleventh Circuit "absolute rule that a prior decision of the circuit (panel or en banc) [cannot] be overruled by a panel but only by the court sitting en banc." *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *accord Va. Props., Inc. v. Home Ins. Co.*, 74 F.3d 1131, 1132 n.2 (11th Cir. 1996) (citing *Bonner* and other authority).

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Park Dist., 851 F.2d 937, 945 (7th Cir. 1988) (first *Gingles* precondition requires a minority group to have a "voting age majority" of population), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989). The issue is unresolved in two circuits. *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam) (holding "[w]e are thus unwilling *at the complaint stage* to foreclose the possibility that a section 2 claim can ever be made out" with a minority population of 21 percent) (emphasis changed); *Romero*, 883 F.2d at 1424 n.7, 1427 n.15 (9th Cir.) (straddling the fence via two footnotes, first noting that "[w]e are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district," **[***26]** but also "express[ing] no opinion as to whether section 2's protections extend to a *coalition* of racial or language minorities"). No circuit has agreed with defendants and affirmatively held that Section 2 can be satisfied by the creation of coalition, crossover, or influence districts.

We find these cases to be sensible and persuasive. When a minority group lacks a numerical majority in a district, "the ability to elect candidates of their own choice was never within the [minority group's] grasp." *Hall*, 385 F.3d at 430. If a **[***27]** minority group lacks the voting population "to independently decide the outcome of an election," it cannot demonstrate that its voting strength has been diluted in violation of Section 2 because **[**373]** it cannot show that any

electoral structure or practice has thwarted its ability or potential to elect candidates of its choice. *Id.* at 429. "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by [a vote-diluting] structure or practice." *Gingles*, 478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17; *see also Hall*, 385 F.3d at 429.

Several federal cases have described this interpretation as imposing a "bright line rule." *See McNeil*, 851 F.2d at 944 (the *Gingles* preconditions can be viewed as a "brightline requirement" that the minority voters make up the majority of the district); *Valdespino*, 168 F.3d at 552 ("[T]his court has interpreted the *Gingles* factors as a bright line test."). This bright line rule, requiring a minority group that otherwise meets the *Gingles* preconditions to constitute a numerical majority of citizens of voting age, can be applied fairly, equally, and consistently **[***28]** throughout the redistricting process. With a straightforward and easily administered standard, Section 2 legislative districts will be more uniform and less susceptible to ephemeral political voting **[*505]** patterns, transitory population shifts, and questionable predictions of future voting trends. A bright line rule for the first *Gingles* precondition "promotes ease of application without distorting the statute or the intent underlying it." *McNeil*, 851 F.2d at 942.

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In addition, a bright line rule provides our General Assembly a safe harbor for the redistricting process. Redistricting should be a legislative responsibility for the General Assembly, not a legal process for the courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates. In such a case, courts would be asked to decide just how small a minority population can be and still claim that Section 2 mandates the drawing of a legislative district to prevent vote dilution. "[A]n unrestricted breach of **[***29]** this precondition 'w[ould] likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes.'" *Dillard*, 376 F.3d at 1268 (quoting *Hastert*, 777 F. Supp. at 654 (alterations in original)). "The first *Gingles* precondition provides a gate-keeping mechanism by which the courts maintain" ascertainable and objective standards from which to adjudicate Section 2 claims. *Id.* Although we acknowledge that a bright line rule "might conceivably foreclose a meritorious claim," in general it "ensure[s] that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal claims." *McNeil*, 851 F.2d at 943. "In making that trade-off, the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy." *Id.*

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Besides the advantages of a bright line rule requiring a minority group to have a numerical majority of citizens of voting age, we are also advertent to the disadvantages of coalition, crossover, and influence districts. Without a rule requiring a numerical majority of citizens of voting age, "there appears to be no logical or objective measure for establishing a threshold **[***30]** minority group size necessary" for Section 2 legislative districts. *Hastert, 777 F. Supp. at 654.* In addition, courts could be called upon to divine whether coalitions would hold together through biennial and quadrennial election cycles, whether a majority group would continue to cross over through the election cycles, whether one minority group would consistently support another minority group's primary election candidate, what percentage of a minority group would vote with or against that minority, whether the claims of one minority group are superior to those of **[*506]** another minority group, and so on. We do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.

We also recognize a specific tension in the *Gingles* preconditions if crossover districts are permitted to satisfy Section 2 requirements. A crossover district is premised upon a minority group gaining support from voters in the typically Caucasian majority to **[**374]** elect the candidate of the minority group's choice. In apparent contradiction, the third *Gingles* precondition

requires that the majority population vote "sufficiently [***31] as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 92 L. Ed. 2d at 47. Consequently, if the majority group does not vote sufficiently as a bloc, the third *Gingles* prong cannot be met. When a minority group is able to accumulate sufficient crossover Caucasian votes that the minority candidate is successful, however, the *Gingles* premise that the Caucasian majority votes *as a bloc* to defeat the minority group's candidate is undermined. *Metts*, 363 F.3d at 12 (recognizing the "tension" in "any effort to satisfy both the first and third prong of *Gingles*," and observing that "[t]o the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut"). In short, a high level of crossover voting is inconsistent with the majority bloc voting defined in the third *Gingles* precondition and weakens the possibility of vote dilution. *See id.* at 13-14 (Selya, J., dissenting) (contending that a showing of majority bloc voting is "structurally inconsistent" with a crossover [***32] district).

Thus, after taking into account the language of *Gingles*, the weight of persuasive authority from the federal circuits, the importance of imposing a practicable rule, the necessity for judicial economy, the redistricting responsibility of the General Assembly,

and the inherent tension lurking in the third *Gingles* prong, we conclude that a bright line rule is appropriate. Accordingly, if a minority group is geographically compact but nevertheless lacks a numerical majority of citizens of voting age, the minority group lacks the power to decide independently the outcome of an election, and its voting power has not been diluted by the lack of a legislative district. In such a case, the first *Gingles* precondition has not been satisfied and the General Assembly is not required to create a Section 2 legislative district.

As presently drawn, House District 18 does not meet this bright line test. The district has a total African-American population of 42.89 **[*507]** percent, and an African-American voting age population of 39.36 percent. Although the record does not reveal the number of voting-age African-Americans who are citizens, that number cannot exceed the total minority voting age population. **[***33]** Because the African-American minority group in House District 18 does not constitute a numerical majority of citizens of voting age, House District 18 does not meet the first *Gingles* precondition and its current configuration is not mandated by Section 2 of the VRA.

As we noted at the beginning of this opinion, the formation of legislative districts must comport with the requirements of our State Constitution, unless federal law supercedes those provisions. Accordingly, because current House District 18 is not required by

Section 2, it must comply with the redistricting principles enunciated by this Court in *Stephenson I*. The WCP forbids the division of a county in the formation of a legislative district, *N.C. Const. art. II, §§ 3(3), 5(3)*, except to the extent the WCP conflicts with the VRA and "one-person, one-vote" principles, *Stephenson I, 355 N.C. at 381, 562 S.E.2d at 396*. The importance of counties in the redistricting process was discussed at length in *Stephenson I, id. at 364-68, 562 S.E.2d at 385-88*, in which we noted the "long-standing tradition of respecting county lines during the redistricting process in this State," *id. at 366, 562 S.E.2d at 386*. The U.S. Supreme Court **[***34]** acknowledges the importance of "'traditional districting principles such as maintaining communities of interest and traditional boundaries'" in redistricting. *Abrams v. Johnson*, 521 U.S. 74, 92, 117 S. Ct. 1925, 138 L. Ed. 2d 285, 303 (1997) (quoting *Bush v. Vera*, 517 U.S. 952, 977, 116 S. Ct. 1941, 135 L. Ed. 2d 248, 269 (1996) (plurality)); *see also Stephenson I*, 355 N.C. at 381, 562 S.E.2d at 396 ("[O]peration of federal law does not preclude states from recognizing traditional political subdivisions when drawing their legislative districts."). Thus, the General Assembly must comply with the WCP to the "maximum extent possible," **[**375]** consistent with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391.

Stephenson I established nine requirements for a valid redistricting plan, several of which are relevant to House District 18:

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[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[*508][4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member **[***35]** non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary **[**376]** to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard,

> whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.
>
> [6.] **[***36]** The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined[.]
>
> [7.] . . . [C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.

Stephenson II, 357 N.C. at 306-07, 582 S.E.2d at 250 (emphasis omitted) (quoting and numbering the *Stephenson I* factors, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (alterations in original)).

The General Assembly created House District 18, the only legislative district specifically at issue in this appeal, with the intention of complying with the requirements of Section 2 and thus with the belief that the district was exempt from the WCP and

Stephenson I requirements. However, as explained above, the configuration of House District 18 is not required by Section 2, and thus the VRA neither controls the formation of that district nor supercedes our State **[*509]** Constitution. Consequently, House District 18 must be drawn in accordance with the WCP and the *Stephenson I* requirements.

Pursuant to N.C.G.S. § 120-2.3 (2005), any judicial opinion **[***37]** which declares a redistricting plan "unconstitutional or otherwise invalid, in whole or in part and for any reason" must "identify every defect found by the court, both as to the plan as a whole and as to individual districts." Although the language of *§ 120-2.3* appears to be directed to trial courts that make findings of fact and conclusions of law, we acknowledge the General Assembly's need to know with specificity how a defective district fails to meet constitutional and statutory standards. Accordingly, we follow the statute's directive.

From the information provided by the parties in the record before us, it appears New Hanover County has a total population large enough to form two or more non-VRA legislative districts that need "not traverse the exterior geographic boundary" of the county, which would satisfy the fourth requirement of *Stephenson I. Stephenson I, 355 N.C. at 383, 562 S.E.2d at 397.* Pender County, in contrast, lacks sufficient population to support a non-VRA House district. Therefore, to comply with the fifth *Stephenson I* requirement, a voting district that

includes Pender County must add population across a county line, but "only to the extent necessary to comply **[***38]** with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id. at 384, 562 S.E.2d at 397.* In following the sixth *Stephenson I* requirement, the districts within these counties must all comply with the WCP "to the maximum extent possible," and "only the smallest number of counties necessary to comply with the . . . 'one-person, one-vote' standard shall be combined." *Id.*

As a remedy, plaintiffs contend two House districts should be drawn in New Hanover County and one House district should be drawn comprising all of Pender County and a portion of New Hanover County. This Court declines, however, to specify the exact configuration of House District 18 or the configuration of House districts in Pender and New Hanover counties generally. "[R]edistricting is a legislative responsibility, [and] N.C.G.S. §§ 120-2.3 and 120-2.4 give the General Assembly a first, limited opportunity to correct plans that the courts have determined are flawed." *Stephenson v. Bartlett*, 358 N.C. 219, 230, 595 S.E.2d 112, 119 (2004) (*Stephenson III*). "Not only do these statutes allow the General Assembly to exercise its proper responsibilities, they decrease the risk that the courts will encroach **[***39]** upon the responsibilities of the legislative branch." *Id.*

[*510] Although we leave to the General Assembly the drawing of either House District 18 or the surrounding districts in Pender, New Hanover, and

other counties in the vicinity, we direct that all redistricting plans for the North Carolina House of Representatives and North Carolina Senate comply with the principal holding of this case: in order for a minority group to satisfy the first *Gingles* precondition and be "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46, it must constitute a numerical majority of citizens of voting age. Any legislative district designated as a Section 2 district under the current redistricting plans, and any future plans, must either satisfy the numerical majority requirement as defined herein, or be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina and with *Stephenson I* requirements.

Since House District 18 fails to comply with the WCP and *Stephenson I* requirements, it must be redrawn. We leave to the General Assembly the decision whether House District 18 should be redrawn as a **[***40]** non-VRA district, or whether it should be redrawn to meet the numerical majority requirement to satisfy the first *Gingles* precondition.

We are cognizant that the General Assembly will need time to redistrict not only House District 18 but also other legislative districts directly and indirectly affected by this opinion. The North Carolina General Assembly is now in recess and is not scheduled to reconvene until 13 May 2008, after the closing of the period for filing for elective office in 2008. We also

realize that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn. Accordingly, to minimize disruption to the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election. *See Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506, 551 (1964) ("In awarding or withholding immediate relief [in an apportionment case], a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption [***41] of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree."). At the conclusion of the 2008 election, House District 18 and other impacted districts must be redrawn. All redistricting performed thereafter shall comply with this opinion.

[*511] REVERSED.

Justice HUDSON did not participate in the consideration or decision of this case.

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No. 103A06 - Pender County v. Bartlett

DISSENT BY: PARKER; TIMMONS-GOODSON

DISSENT

[377]** Chief Justice PARKER dissenting.

I respectfully dissent. In my view the General Assembly had a sound legal basis for concluding that the configuration of North Carolina House District 18 in the 2003 House Plan was necessary to comply with Section 2 of the Voting Rights Act. Accordingly, for the reasons discussed herein, I would affirm the decision of the three-judge panel upholding the division of Pender County.

Article II, Section 3, Clause 3 and Section 5, Clause 3 of the North Carolina Constitution, collectively referred to as the "Whole County Provisions" (the WCP), provide that "[n]o county shall be divided" in the formation of senate and representative districts. In *Stephenson I* and *Stephenson II*, this **[***42]** Court established legal principles, including application of the Whole County Provisions, under which the legislature's redistricting authority is exercised; however, the Court deferred to the Supremacy Clauses of both the State and Federal Constitutions for purposes of applying the WCP. *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*); *Stephenson v. Bartlett*, 357 N.C.

301, 582 S.E.2d 247 (2003) (*Stephenson* II). This Court explained the supremacy of federal law as follows:

> We recognize that, like the application or exercise of most constitutional rights, the right of the people of this State to legislative districts which do not divide counties is not absolute. In reality, an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.

Stephenson I, 355 N.C. at 371, 562 S.E.2d at 389 (internal citations omitted). Throughout **[***43]** its opinion, this Court repeatedly noted that the WCP must yield to provisions of the Voting Rights Act prohibiting the dilution of minority voting strength. "[T]he State retains significant discretion when formulating legislative districts, so long as the **[*512]** 'effect' of districts created pursuant to a 'whole-county' criterion or other constitutional requirement does not dilute minority voting strength in violation of federal law." *Id.* at 370, 562 S.E.2d at 389. "Although no federal law has preempted this Court's authority to interpret the WCP as it applies statewide, we

acknowledge that complete compliance with federal law is the first priority before enforcing the WCP." *Id.* at 374 n.4, 562 S.E.2d at 391 n.4.

Finally, this Court established nine criteria to be followed by the General Assembly in drawing legislative districts. The first criterion expressly requires drawing districts that comply with the provisions of the Voting Rights Act:

> [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct [***44] the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP.

Stephenson II, 357 N.C. at 305, 582 S.E.2d at 250 (alterations in original) (emphasis omitted) (citing *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97).

Section 2 of the Voting Rights Act forbids any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42

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U.S.C. § 1973(a) (2000). A State is in violation of Section 2

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political **[**378]** process and to elect representatives of their choice.

Id. § 1973(b) **[***45]** (2000).

In construing the totality of circumstances test, the United States Supreme Court in *Gingles* relied upon the Senate Report accompanying **[*513]** the 1982 VRA Amendments, stating, "the Committee determined that the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45, 106 S. Ct. 2752, 92 L. Ed. 2d 25, 43 (1986) (quoting S. Rep. No. 97-417, at 30 (1982) (citations, internal quotation marks, and footnotes omitted)). In providing structure to the totality of circumstances inquiry, the Court in *Gingles*

enumerated three threshold factors for establishing vote dilution as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district . . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.

Id. at 50-51, 92 L. Ed. 2d at 46-47 (internal [***46] citations and footnote omitted).

With respect to whether a minority group is sufficiently large to "constitute a majority," the Court in *Gingles* disclaimed mechanical application of the first precondition by stating:

> We have no occasion to consider whether *§ 2* permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.

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Id. at 46 n.12, 92 L. Ed. 2d at 44 n.12. Thus, the Court declined to address whether the first threshold requirement could extend to a group that constitutes a sufficiently large minority to elect the candidate of its choice with the assistance of limited, yet predictable, crossover votes from the white majority.

In her concurring opinion, Justice O'Connor rejected the distinction between a Section 2 claim in which the minority constitutes a numerical majority in a district and a Section 2 claim when the minority group, though not a majority in the proposed district, has the ability to elect its candidate of choice with the assistance of limited crossover **[***47]** support from white voters, stating:

> **[*514]** I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante*, at 46-47, n.12. . . . [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white

> support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. at 90 n.1, 92 L. Ed. 2d at 72 n.1 (O'Connor, J., Burger, C.J., Powell & Rehnquist, JJ., concurring in the judgment).

In subsequent cases, the United States Supreme Court has not endorsed a bright line requirement **[***48]** that a minority group seeking Section 2 VRA relief constitute a numerical majority. In fact, despite having the opportunity to do so, the Court has repeatedly declined to close the door on the issue. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09, 114 S. Ct. 2647, 129 **[**379]** L. Ed. 2d 775, 789-90 (1994) (in which the Court declined to hold that plaintiffs could not make a VRA claim based on influence districts); *Voinovich v. Quilter*, 507 U.S. 146, 154, 113 S. Ct. 1149, 122 L. Ed. 2d 500, 511 (1993) (in which the Court declined to address whether a reapportionment commission's failure to create influence districts resulted in a Section 2 violation); *Growe v. Emison*, 507 U.S. 25, 41, 113 S. Ct. 1075, 122 L. Ed. 2d 388, 404 & n.5 (1993) (in which the Court declined to decide if plaintiffs could argue influence dilution in addition

to vote dilution when the *Gingles* test was not satisfied).

Moreover, the Supreme Court has continued to caution lower courts against applying *Gingles* to impose a rigid numerical majority requirement. In *Voinovich*, the Supreme Court explained that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. at 158, 122 L. Ed. 2d at 514. Justice O'Connor noted that **[***49]** the first *Gingles* requirement would have to be "modified or eliminated" when the Court considered cases in which black voters are denied "the possibility of being a sufficiently **[*515]** large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority." *Id.*

Recently, in League of United Latin American Citizens v. Perry, ___ U.S. ___, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006), the Supreme Court was confronted with the issue presented in this case. In the plurality opinion of Justice Kennedy, Part IV addressed the first *Gingles* threshold condition by assuming, as the Court had done in the past, that it is possible for a minority group that makes up less than fifty percent of the district's population to state a claim under Section 2. *Id.* at 2624, 165 L. Ed. 2d at 647 (plurality). Justice Kennedy concluded that under this assumption, the racial minority "must show they constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Id.* at 2624, 165 L. Ed. 2d at 647 (plurality) (quoting

Voinovich, 507 U.S. at 158, 122 L. Ed. 2d at 515 (emphasis and internal quotation marks omitted)). Although the Court concluded **[***50]** that no Section 2 violation occurred, the Court did so based on its determination that the evidence did not show that black voters could elect a candidate of their choice, even with crossover voting.

Justice Souter, in a separate opinion joined by Justice Ginsberg, dissented from Part IV, in which the plurality upheld the trial court's ruling that no Section 2 violation of the VRA occurred. *Id.* at 2648, 165 L. Ed. 2d at 672 (Souter & Ginsburg, JJ., concurring in Parts II-A, II-D, III, and dissenting from Part IV). Justice Souter concluded that "[a]lthough both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, the day has come to answer it." *Id.* at 2648, 165 L. Ed. 2d at 672-73 (Souter and Ginsburg, JJ., dissenting) (internal citations omitted). Justice Souter would have returned the Section 2 VRA claim to the district court for reconsideration "untethered by the 50% barrier." *Id.* at 2651, 165 L. Ed. 2d at 677 (Souter & Ginsburg, JJ., dissenting). Justice Stevens, in his dissenting opinion, stated, "I agree with Justice Souter that the '50% **[***51]** rule,' which finds no support in the text, history, or purposes of *§ 2*, is not a proper part of the statutory vote dilution inquiry." *Id.* at 2645 n.16, 165 L. Ed. 2d at 670 n.16 (Stevens, J., dissenting).

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Although the Supreme Court has repeatedly left open the issue, several lower federal courts, as noted by the majority, have ruled that a numerical majority is necessary to establish a Section 2 claim. *See,* **[*516]** *e.g., Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), *cert. denied*, 544 U.S. 961, 125 S. Ct. 1725, 161 L. Ed. 2d 602 (2005) *and Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997, 125 S. Ct. 627, 160 L. Ed. 2d 454 (2004).

In *Hall*, the plaintiffs contended that a redistricting plan which reduced the black voting age population of a district from 37.8% to 32.3% violated Section 2 of the VRA because, under the newly drawn Fourth Congressional District, blacks were too small in **[**380]** number to form the same winning coalition with crossover white voters that existed before enactment of the plan. By requiring a literal numerical majority, the *Hall* court did not determine whether, prior to the new redistricting plans, blacks in the district had the ability to elect a candidate of choice **[***52]** with the support of limited crossover votes. Stated differently, the court did not determine whether a 37.8% black voting age population constituted a sufficiently large minority presence in the district to allow minority voters the ability to elect their candidate of choice with a small, but predictable, number of crossover votes, and consequently, whether reducing the minority presence in the district to 32.3% would cause blacks to lose the ability to elect a

candidate by making successful coalition voting impossible.

In *Rodriguez v. Pataki*, the court opined that "[e]ven if the first *Gingles* factor were applied flexibly to accommodate crossover or 'ability to elect' districts, the plaintiffs would have to prove that their proposed district would provide blacks with the ability to elect candidates of choice." 308 F. Supp. 2d at 403 (citation omitted). Although the *Rodriguez* court stated its preference for a bright-line rule, it denied the plaintiffs' ability to elect claim not because the black population in the district was less than fifty percent, but because the plaintiffs did not present sufficient evidence that blacks would have the ability to elect candidates of their choice. **[***53]** *Id.* at 403.

North Carolina courts are not bound by decisions of the Fourth Circuit or any other lower federal court, but only by a decision of the United States Supreme Court. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1165, 106 S. Ct. 2292, 90 L. Ed. 2d 732 (1986).

In North Carolina's legislative elections, a clear pattern exists which demonstrates the level of minority presence necessary to give minority voters an opportunity to elect their preferred candidates. Prior voting patterns reveal that house districts in North Carolina having total black population percentages of 41.54% and above and **[*517]** black voting age population percentages of 38.37% and above provide

an effective opportunity to elect black candidates. The record shows that the General Assembly considered the most relevant indicator of black voting strength to be black Democratic voter registration; districts where such registration exceeds fifty percent consistently elect black representatives.

In this case, the minority concentration in House District 18 in the 2003 Plan consisted of a total black population of 42.89%, a black voting age population of 39.36%, and a black Democratic voter registration **[***54]** of 53.72%. In House District 18, election results have already established that minority voters have the potential to elect a representative of choice.[3] The 2004 election results, held under the 2003 plan, demonstrated that District 18 as currently drawn is an effective minority voting district in which the minority voters' preferred candidate was re-elected. Unquestionably, a black candidate can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent.

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[3] District 18 can be described as an "ability to elect" or "crossover" district. An "ability to elect district" is a district where members of the minority group are not a majority of the voting population, but have the ability to elect representatives of their choice with support from a limited, but reliable, white crossover vote. *Rodriguez v. Pataki*, 308 F. Supp. 2d at 376 (citation omitted).

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Altering the district to further reduce the minority population would result in dilution of a distinctive minority vote. In *Hall*, the court found that a minority group's voting strength is measured in terms of the group's "ability to elect candidates to public office." 385 F.3d at 427. **[***55]** However, minority voters who do not form a numerical majority in a district but who can elect their candidate of choice with a limited number of crossover votes do, indeed, have the "ability to elect." Taking this predictable measure away from minorities leaves them with "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(b).

The three-judge panel reviewed the existing law and correctly declined to follow a rigid test requiring an absolute numerical majority of minority voters in a single-member **[**381]** district. The panel instead took a functional approach and found that the proper factual inquiry in analyzing a "coalition" or an "ability to elect district" is not whether black voters make up the numerical majority of voters in a single-member district, but whether "the political realities of the district, such as the political affiliation and number of black registered voters **[*518]** when combined with other relevant factors" operate to allow black voters to elect their candidate of choice. Such an inquiry must focus on the potential of black voters to elect their preferred candidates, not merely on raw numbers alone.

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Recent United [***56] States Supreme Court opinions suggest that the application of a numerical majority requirement without respect to attendant political circumstances is not the appropriate test of the merits of a Section 2 Voting Rights Act claim. Nowhere in the language of Section 2 is there a requirement that a district must include a population of more than fifty percent of minority voters in order for a petitioner to state a claim for relief under Section 2. Rather, the "totality of circumstances" language mandates a flexible standard based on political realities of the district and supports creation of a district in which the minority group has the ability to elect a representative of choice with crossover support from voters of other racial or ethnic groups.

Under this Court's prior rulings, the General Assembly must meet the requirements of federal law before adhering to the Whole County Provisions in Article II, Section 3, Clause 3 and Section 5, Clause 3 of the North Carolina Constitution. *See Stephenson I*, 355 N.C. at 381-82, 562 S.E.2d at 396-97. In drawing House District 18 in Pender and New Hanover Counties, the General Assembly sought to maintain an effective minority district to comply [***57] with Section 2 of the VRA and to comply with the WCP to the maximum extent possible. Following the principles this Court established in the *Stephenson v. Bartlett* cases, the three-judge panel properly concluded that no county, including Pender County, is guaranteed protection from being divided based on the WCP of our

State Constitution when the division of counties is necessary to comply with the Voting Rights Act.

House District 18, as presently drawn, contains a black voting age population that is "sufficiently large and geographically compact" to elect its candidate of choice, *Gingles*, 478 U.S. at 50, 92 L. Ed. 2d at 46, and the General Assembly drew House District 18 to comply with the North Carolina Constitution to the maximum extent possible.

For the forgoing reasons, I would vote to affirm the decision of the three-judge panel.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

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[*519] Justice TIMMONS-GOODSON dissenting.

I join the Chief Justice's dissent. Furthermore, I write separately to express my concern that in overriding our legislature's decisions in order to impose a bright-line rule, the majority has given insufficient deference to the legislature's considered judgment. **[***58]** As the Supreme Court of the United States has stated, "The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." *Weems v. United States*, 217 U.S. 349, 379, 30 S. Ct. 544, 554, 54 L. Ed. 793, 803 (1910). "'[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" *Gregg v. Georgia*, 428 U.S. 153, 175-76, 96 S. Ct. 2909, 2926, 49 L. Ed. 2d 859, 876 (1976) (judgment of the court and opinion of Stewart, Powell & Stevens, JJ.) (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 92 S. Ct. 2726, 2800-01, 33 L. Ed. 2d 346, 432, (1972) (Burger, C. J., Blackmun, Powell & Rehnquist, JJ., dissenting)).

Since the majority's calculus does not appear to appropriately factor in the legislature's role in the districting process, and the deference due it, I respectfully dissent.

***Pender County v. Bartlett*, Wake County Superior Ct., Summary Judgment Order, Dec. 2, 2005**

IN THE GENERAL COURT OF JUSTICE
NORTH CAROLINA
WAKE COUNTY
SUPERIOR COURT DIVISION
04 CVS 0696

PENDER COUNTY, *et al.*,

Plaintiffs,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections, *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

THIS MATTER is before the Court upon plaintiffs' ("Pender County") and defendants' ("BOE") cross motions for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. Pender County seeks permanent injunctive relief to forbid the use of House districts 16 and 18 as currently constituted under the North Carolina General Assembly's November 25, 2003, legislative redistricting plan.

***Pender County v. Bartlett*, Wake County Superior Ct., Summary Judgment Order, Dec. 2, 2005**

Procedural Background

This case was instituted on May 14, 2004, by the filing of a complaint in the Superior Court of Wake County. The subject matter of the case involves a legal challenge by Pender County and the other named plaintiffs to portions of the N.C. House of Representatives' legislative redistricting plan adopted by the North Carolina General Assembly on November 25, 2003.

Pender County has been divided between two House Districts in the 2003 Redistricting Plan. Pender County contends that this division violates the Whole County Provision (WCP) of the North Carolina Constitution as defined in ***Stephenson v. Bartlett*, 355 N.C. 354** (2002) (***Stephenson I***) and ***Stephenson v. Bartlett*, 357 N.C. 301** (2003) (***Stephenson II***).

N.C.G.S. 1-267.1 requires that lawsuits seeking to challenge legislative redistricting plans be filed in the Superior Court of Wake County and that such challenges be heard by a Three-Judge Panel appointed by the Chief Justice of the State of North Carolina.

Chief Justice I. Beverly Lake, Jr., signed an Order dated May 24, 2004, appointing the Three-Judge Panel for Redistricting Challenges as defined in G.S. 1-267.1 to hear and determine the action challenging that portion of the 2003 Legislative Redistricting Plan relating to House seats in North Carolina House

Districts 16 and 18 (Pender and New Hanover Counties).

The BOE filed an Answer on June 4, 2004, asserting as one of many defenses, that the division of Pender County into two House districts was required by federal law, the supremacy of which under the federal and state constitutions was specifically acknowledged in ***Stephenson I and II***.

The BOE contended that House District 18 was drawn for the purpose of providing black voters in Pender and New Hanover Counties an equal opportunity to elect a candidate of their choice in order to comply with Section 2 of the Voting Rights Act ("VRA").

On June 11, 2004, Pender County filed a motion for preliminary injunction and motion for summary judgment on permanent injunction seeking to enjoin the defendants from proceeding with primary and general elections for the 16th and 18th North Carolina House Districts as they now exist under the November 25, 2003, legislative redistricting plans adopted by the North Carolina General Assembly.

The Three-Judge Panel scheduled a hearing on the motion for preliminary injunction for Friday, June 25, 2004. The parties submitted affidavits, stipulations of fact, and memoranda of law several days prior to the hearing on the motion for preliminary injunction.

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The hearing was held as scheduled on June 25, 2004. The Three-Judge Panel advised that it would only consider the issue of whether or not a preliminary injunction should issue to stop the election process. The parties made oral arguments and the Three-Judge Panel recessed for two hours to consider the matter. The Three-Judge Panel reconvened to announce its unanimous decision in open court and denied the motion for preliminary injunction. A written summary of the decision was provided to the parties, filed with the Clerk of Superior Court of Wake County and provided that a written order would follow in due course.

There was no request from the parties for findings by the Three-Judge Panel pursuant to Rule 52, North Carolina Rules of Procedure and thus findings of fact and conclusions of law are not required when a motion for preliminary injunction is denied. The Three-Judge Panel entered its Order denying Pender County's motion for preliminary injunction in September, 2004.

On February 25, 2005, the parties filed cross motions for summary judgment. Thereafter, the parties filed Stipulations of Fact and Amended Stipulations of Fact (April 27, 2005) together with briefs and reply briefs in support of their respective positions.

On July 14, 2005, the Three-Judge Panel noticed the motions for summary judgment for hearing on

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Tuesday, August 30, 2005. On August 30, 2005, the parties presented their arguments before the Three-Judge Panel and the Panel took the motions under advisement. The Panel has now had the time to review and consider the Amended Stipulations of Fact, the arguments, memoranda of law, and the record in this case. This matter is ripe for disposition.

At the outset, the Court will address the issue as to whether or not Pender County, acting through its duly elected County Commissioners, can sue the State of North Carolina over its legislatively adopted Redistricting Plan.

The Court notes that this action is brought on behalf of Pender County by Pender County Commissioners Strickland, Williams, Rivenbark, Holland and Meadows, both individually and in their official capacities as county commissioners. The BOE defendants are sued in their official capacities, and not as individuals, as Executive Director of the State Board of Elections, Members of the State Board of Elections, the then Co-Speakers of the North Carolina House of Representatives, the President Pro-Tempore of the North Carolina Senate, the Governor of the State of North Carolina and the Attorney General of the State of North Carolina. Thus, in effect, by commencing this action against the heads of the Executive and Legislative Branches and the State Board of Elections in their official capacities, Pender County has sued those branches of the government of

the State of North Carolina and the agency responsible for executing the legislation at issue.

Pender County, a municipal corporation, is a political subdivision of the State of North Carolina and can only exercise those municipal powers that have been granted to it by the legislature. ***Jones v. Commissioners, 137 N.C. 579,596 (1905); Bowers v. City of High Point, 339 N.C. 413,417 (1994); Homebuilders Ass'n of Charlotte, 335 N.C. 37,41-42 (1994).***

For over 100 years North Carolina followed the narrow rule of common law known as "Dillon's Rule" which provided that:

> A municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential for the accomplishment of the declared objects and purposes of the corporation - not simply convenient, but indispensable. ***Bellsouth Telecommunications, Inc. v. City of Laurinburg, 168 N.C. App. 75(2005).***

Dillon's Rule has been broadened by the General Assembly by the enactment of N.C.G.S. 160A-4, in order to make it clear that the provisions of Chapter 160A of the General Statutes of North Carolina, which

pertains to cities and towns, shall be broadly construed to include any additional and supplementary powers that are reasonably necessary and expedient to carry them into effect. Bellsouth Telecommunications, supra. However, nowhere in this statute does the legislature give to cities and towns the authority to sue the State of North Carolina.

This Court is unaware of any statute that authorizes a county to file a civil action against the State of North Carolina to challenge the constitutionality of a redistricting statute enacted by the General Assembly of North Carolina. See discussion in ***Appeal of Martin, 286 N.C. 66, at 73-74 (1974)***, wherein the Supreme Court held that a county did have standing to challenge the constitutionality of a statute limiting its taxing power. Furthermore, the concept underlying Dillon's Rule is recognized nationally. ***Coleman v. Miller, 307 US 433 (1939)***.

Therefore, the Court holds that Pender County, and its County Commissioners acting in their official capacities, have no standing to bring this action, and they will be dismissed. This does not, however, end the case as the individual claims of Strickland, Williams, Rivenbark, Holland and Meadows as they, as individual private citizens and voters of Pender County, have standing to sue to seek redress from allegedly unconstitutional action by the BOE in the

enactment and execution of the 2003 Legislative Redistricting Plan for the House of Representatives.

Resolving the issue of standing, however, does not resolve the case. Accordingly, the Court will address the merits of the claim. To that end, pertinent stipulations of fact and other undisputed facts of record follow:

FACTUAL BACKGROUND

I. THE NORTH CAROLINA GENERAL ASSEMBLY

1. The North Carolina General Assembly consists of the Senate and the House of Representatives. N. C. CONST. art. II, Section 1. Members of both the Senate and the House of Representatives are elected for two-year terms. N. C. CONST. art. II, Sections 2 and 4. The North Carolina House of Representatives has 120 members. The North Carolina Senate has 50 members.

2. Pursuant to the decisions of the North Carolina Supreme Court in ***Stephenson I*** and ***Stephenson II***, in 2002 and 2004 these 120 house members were elected from 120 single-member districts. The terms of the members elected in 2002 commenced on January 1, 2003, and the terms of the members elected in 2004 commenced on January 1, 2005.

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3. At the time of redistricting in 1981 and 1982, there were 3 African-Americans serving in the House. After the 1982 redistricting, 11 African-Americans served in the House in 1983. After the ***Gingles*** litigation and redistricting, 13 African-Americans served in the House in 1985 and in 1987; and 14 served in 1989. The names of the African-American Representatives and the districts they represented are contained in Exhibit F. Of the 120 members of the 1991 House, 81 were Democrats and 39 were Republicans; 105 were white, 14 were African-American, and 1 was a Native American.

4. After the 1991 redistricting, of the 120 members of the 1993 House, 78 were Democrats and 42 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American.

5. Of the 120 members of the 1995 House, 52 were Democrats and 68 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American.

6. Of the 120 members of the 1997 House, 59 were Democrats and 61 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American.

7. Of the 120 members of the 1999 House, 66 were Democrats and 55 were Republicans; 102 were white,

17 were African-American, and 1 was a Native American.

8. Of the 120 members of the 2001 House, 62 were Democrats and 58 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American.

9. After the 2001 and 2002 redistricting and elections under the Jenkins Plan ("Interim House Plan" drawn by Judge Jenkins and in effect for the 2002 election), of the 120 members of the 2003 House, 60 or 61 were Democrats and 59 or 60 were Republicans (the fluctuation in numbers being to due to a representative who changed party affiliation twice during the 2003 session); 101 were white, 18 were African-American, and 1 was a Native American.

10. After election under the legislature's 2003 Plan, of the 120 members of the current 2005 House, 63 are Democrats and 57 are Republicans; 100 are white, 19 are African-American, and 1 is a Native American.

II. REDISTRICTING SINCE 1982 AS IT HAS AFFECTED PENDER COUNTY

11. In the House redistricting plan enacted in 1982 and modified in response to ***Gingles***, which remained in effect until the 1992 elections, Pender County was divided between two districts: District 12, which also included Sampson and Bladen counties, and District

14, which also included Brunswick County and a portion of New Hanover County.

12. In the 1992 Plan, which remained in effect until the 2002 elections, Pender County was divided between three districts: District 12, which included portions of Pender, and Sampson counties; District 96, which included portions of Pender, Bladen, Cumberland and Sampson counties; and District 98, which included portions of Pender, Brunswick, Columbus and New Hanover counties. District 98 was identified by the General Assembly as a VRA district; it had a total black population of 59.26% and a black voting age population of 55.72%, based on the 1990 Census. Based on the 2000 Census, District 98 had a total black population of 50.70% and a black voting age population of 47.07%.

Disaggregated Data for District 98 Using 2000 Census Data

13. District 98 elected Representative Wright in 1992, 1994, 1996, 1998, and 2000. Using the 2000 Census data, District 98 had a voter registration total of 38,998. Of this number, Democratic voters comprised 62.53%, Republican voters comprised 22.21%, and Unaffiliated voters comprised 14.99%. The percentage of black Democratic voters was 53.37% as compared to 43.73% white. Since black Democratic voters constituted the majority of Democrats in District 98, Representative Wright had the obvious edge over a

white Democratic challenger in any primary for House Seat in District 98. The election results for 1992, 1994, 1996, 1998 and 2000 in District 98 are the proof in the pudding that a black Democrat had the best chance of winning a House seat because he or she could win the Democratic primary and face a General Election minority of Republican (22.21%) and/or combination of unaffiliated voters (14.99%) whose combined total was less than 38% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up **62.53%** of the total voters in District 98. The General Assembly created District 98 as a VRA district and Representative Wright continually won re-election as a result.

14. In the 2001 Plan (Sutton House Plan 3), Pender County was divided between five districts: District 13, which included portions of Pender, Carteret, Craven and Onslow counties; District 15, which included portions of Pender, New Hanover and Onslow counties; District 18, which included portions of Pender, Brunswick, Columbus and New Hanover Counties; District 19, which included portions of Pender, Bladen, Cumberland, New Hanover and Sampson counties; and District 20, which included portions of Pender, Johnston and Sampson counties. District 18, which included Representative Wright's residence, was identified by the General Assembly and the courts as a VRA district; it had a total black population of

44.00%, a black voting age population of 40.38%. There was no election conducted for District 18 as drawn under Sutton House Plan 3 and the record contains no disaggregated data relating to the number of black registered voters by party affiliation. Democratic registered voters did constitute 62.36% of the proposed district and there were 15,594 black registered voters located in that district.

North Carolina's Section 5 Submission for 2001 House Redistricting Plan (Sutton 3) to the USDOJ for Preclearance under Section 5 of the VRA. (Exhibit 0)

15. The State of North Carolina is required to submit its Redistricting Plan to the USDOJ as 40 of its counties are subject to Section 5 of the VRA. Portions of the Sutton 3 Plan submission follow as Sutton 3 related to House District 18, the present District (although redrawn) which is challenged in this action. Excerpts follow:

> ***The effect of the adoption of Sutton 3 on North Carolina's minority voters is to maintain, in the face of changed demographics and changed federal law, the opportunity of minority voters to elect representatives of their choice.***
>
> ***The 1992 plan, based on 2000 Census data, contained 14 majority-black House districts,***

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10 of which (District 5,7,8,26,70,78,79,87,and 97) included Section 5 counties. Three other majority-black districts (Districts 21 in Wake, 59 in Mecklenburg, and 66 in Forsyth) were in non- Section 5 counties but counties that were the subject of section 2 litigation in Gingles, which required the drawing of single member black districts. Another majority-black district, District 98, is located in four non Section 5 counties in southeastern North Carolina and was drawn as a result of objections by the U.S. Department of Justice during Section 5 preclearance review in 1991. (At the time, preclearance review also included review under Section 2 principles).....

In addition, Sutton 3 resulted in three non-Section 5 districts which, though less than 50% black in total population, nonetheless have at least 40% black total population and afford black voters a strong likelihood of being a dominant political force able to elect representatives of their choice. Those districts are as follows:

District 18 (the equivalent of District 98 in the previous plan) - Parts of Brunswick, Columbus, New Hanover and Pender counties (all non Section 5)..... . This district was

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drawn as a majority black district in 1992 in non-Section 5 counties in response to an objection interposed during Section 5 preclearance that said minority voting strength was not being recognized sufficiently in southeastern North Carolina. The preclearance policies which resulted in those objections subsequently led to the U.S. Supreme Court's decision in Shaw v. Reno and related cases. After Shaw, former district 98's non-compact configurations raised questions regarding the predominance of race in the district's design and narrow tailoring. The proposed District 18 is a more compact district with a black percentage of 44%. The black percentage of Democratic voter registration is 53.04% in the new district and the chart ..... . shows Democratic nominees in the district winning victories of more than 65% without regard to race.

When Sutton 3 received its final approval in the House of Representatives on November 1, 2001, every minority member of the House of Representatives voted "Yes." When it received final approval in the Senate November 13, all the minority Senators who were present voted "Yes."

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16. In the 2002 Plan (Sutton House Plan 5), Pender County was in a single district - District 16 - which also included a portion of New Hanover County. District 16 was not identified by the General Assembly as a VRA district. District 18, that included portions of three counties (Brunswick, Columbus and New Hanover), was identified by the General Assembly and the courts as a VRA district. District 18 had a total black population of 44.00% and a black voting age population of 40.41%.

There was no election conducted for District 18 as drawn under Sutton House Plan 5 and the record contains no disaggregated data relating to the number of black registered voters by party affiliation. Democratic registered voters did constitute 61.74% of the proposed district and there were 19,429 black registered voters located in that district.

17. ***North Carolina's Section 5 Submission for 2002 House Redistricting Plan (Sutton 5) to the USDOJ for Preclearance under Section 5 of the VRA.*** (Exhibit P)- Relating to District 18.

Because forty (40) North Carolina counties are subject to Section 5 of the VRA, the 2002 redistricting plan was subject to review by the United States Attorney General. Once again, the State of North Carolina submitted its entire redistricting plan for the House of Representatives to the USDOJ for Section 5 review. The plan was "pre-cleared" by the USDOJ on

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March 30, 2004, and there was no objection under Section 5 of the VRA. Excerpts follow:

> ***In addition, Sutton 5 Corrected resulted in four non-Section 5 districts which, though less than 50% black in total population, nonetheless have at least 40% black population and afford black voters a strong likelihood of being a dominant political force able to elect representatives of their choice. Those districts are as follows:***
> **** District 18 (the equivalent of District 98 in the 1992 plan) -Parts of Brunswick, Columbus and New Hanover, counties (all non-section 5). ..... . The proposed District 18 is a more compact district with a black percentage of 44%. The 2002 reconfiguration additionally attempts to comply with the Stephenson decision by containing the district within three rather than four non-Section 5 counties, allowing Pender County to be undivided. The black Democratic voter registration is 51.71% in the 2002 district and the chart ..... . Shows statewide Democratic nominees in the district winning victories of more than 60% without regard to race. Rep. Thomas Wright, black legislator who has represented District 98 since 1992..... . voted for Sutton 5.***
> ***..... Statewide, Sutton 3, resulted in a set of districts that reasonably maintains the***

> ***position of racial minorities with respect to their effective exercise of the electoral franchise. Sutton 5 Corrected preserves the same pattern.***

18. In the Jenkins Plan (Interim House Plan), Pender County was in a single district identified as District 16 that also included a portion of New Hanover County. District 16 was not identified by Judge Jenkins as a VRA district. However, District 18, that included portions of three counties (Brunswick, Columbus and New Hanover), was identified by Judge Jenkins as a VRA district; it had a total black population of 46.99% and a black voting age population of 43.44%.

The Attorney General of the United States interposed no objections and pre-cleared the Jenkins Plan under Section 5 of the VRA on July 12, 2002.

Disaggregated Data for Jenkins District 18 Using 2000 Census Data

District 18 elected Representative Wright in 2002. Using the 2000 Census data, District 18 had a voter registration total of 40,450. Of this number, Democratic voters comprised 64.31%, Republican voters comprised 20.77%, and Unaffiliated voters comprised 14.65%. The percentage of Democratic voters that were black was 52.58 as compared to 44.08 white. Since black Democratic voters constituted the majority of Democrats in District 18, Representative

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Wright held obvious edge over any white Democratic challenger in any primary for House Seat in District 18. The election results for 2002 in District 98 are the proof in the pudding that Representative Wright, a black Democrat had the best chance of winning a house seat because he won win the party primary, if one was held, and face a General Election minority of Republican (20.77%) and/or combination of unaffiliated voters (14.65%) whose combined total was less than 32% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up **64.31%** of the total voters in District 18. Judge Jenkins created District 18 as a VRA district and Representative Wright won re-election as a result.

19. In the 2003 Plan, Pender County was divided between two districts - Districts 16 and 18 - both of which also contained portions of New Hanover County. District 18 was identified by the General Assembly as a VRA district, purportedly drawn to comply with the provisions of Section 2 of the Voting Rights Act. District 18 has a total black population of 42.89%, a black voting age population of 39.36% and black Democratic registration of 53.72%. Representative Wright resides in District 18.

Disaggregated Data for 2003 House Plan District 18 Using 2000 Census Data

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Using the 2000 Census data, District 18 had a voter registration total of 38,850. Of this number, Democratic voters comprised 59.01%, Republican voters comprised 23.99%, and Unaffiliated voters comprised 16.57%. The percentage of Democratic voters that are black was 53.72% as compared to 44.96% white. Since black Democratic voters constituted the majority of Democrats in District 18, Representative Wright had the obvious edge over a white Democratic challenger in any primary for House Seat in District 18. The election results for 2004 in District 98 are the proof in the pudding that Representative Wright, a black Democrat had the best chance of winning a House seat because he would win the party primary, if one was held, and face a General Election minority of Republican (23.99%) and/or combination of unaffiliated voters (16.57%) whose combined total was less than 41% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up 59.01% of the total voters in District 18. Representative Wright won re-election in 2004 in District 18. He had no primary opposition and no Republican opposition in the General Election. It appears from this that Thomas Wright is clearly the candidate of choice of black voters in District 18 as presently constituted.

20. ***North Carolina's Section 5 Submission for 2003 House Redistricting Plan (Sutton 5) to the***

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US District Court for the District of Columbia for Preclearance under Section 5 of the VRA. (Exhibit Q) - Relating to District 18.

Again, because forty (40) North Carolina counties are subject to Section 5 of the VRA, the 2003 redistricting plan was subject to review by the United States Attorney General. Once again, the State of North Carolina submitted its entire redistricting plan for the House of Representatives to the USDOJ for Section 5 review. The plan was "pre-cleared" by the USDOJ on March 30, 2004, and there was no objection under Section 5 of the VRA. Excerpts follow:

> ***Minority Voting Strength Statewide***
> ***The 2003 House Redistricting Plan's lack of discriminatory or retrogressive intent is further demonstrated by the plan's attention to minority voters throughout the state in non-Section 5 counties as well as areas covered by Section 5. Statewide, the 2003 House Redistricting Plan maintains or increases the overall electoral strength and effectiveness of minority voters based on the number of districts with black populations of over 50%, over 40% and over 30% as follows: (Chart omitted)..... The 2003 House Redistricting Plan, in areas not covered by Section 5, includes five majority-black (BPOP) districts:..... . There are four over 40% black (BPOP) districts: Districts 72, 18,***

> ***29 and 31. Based on the minority populations and past election results, these nine districts can be expected to continue to elect at least eight black Representatives. Past election results in North Carolina demonstrate that districts with a black voting age population (BVAP) of 37.81% and above can provide an effective opportunity for the election of black candidates .....***
>
> ***In North Carolina, a more important indicator of effective black voting strength is the percentage of registered Democrats who are black. The profiles of districts in the court-drawn 2002 Interim Plans which have elected black representatives.. run from a low of 52.58% in District 18 to a high of 78.87% in District 60. (emphasis added)***

With the foregoing factual background in mind, the Court will now discuss the major issue framed by the parties.

DISCUSSION

The parties to this action have gone to great lengths to frame the major issue before this Court as follows:

Is the present configuration of House District 18 required by Section 2 of the Voting Rights Act?

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Pender County frames the issue in its Memorandum in Support of Motion for Summary Judgment and Permanent Injunction thus:

> ***Under Article II, Section 5(3) of the North Carolina Constitution and the holdings in Stephenson I and II, Pender County should be placed in a single house district unless federal law requires otherwise. Based on the answer filed by Defendants, the only contested legal issue appears to be whether Section 2 of the Voting Rights Act (42 U.S.C. 1973) requires that Pender County be split. The controlling case law on this point is abundantly clear that Pender County need not be split in order to abide by Section 2 of the VRA. (Memorandum page 8, 2/25/05)***

The BOE frames the issue in its Brief in Support of Defendant's Motion for Summary Judgment thus:

> ***In the 2003 House Plan, which only divides 47 of North Carolina's 100 counties, this included the drawing of House District 18 to comply with Section 2 of the Voting Rights Act. Specifically, District 18, a district first drawn (as former District 98) to comply with Section 2 in 1992, was drawn in its current form so that it continued to offer minorities in that part of the State the opportunity to elect a candidate of choice; otherwise the State***

> ***would be vulnerable to a Section 2 Voting Rights Act claim. (Brief, page 6, 3/8/05)***
>
> ***Because of the developing law regarding Section 2 of the Voting Rights Act, the North Carolina General Assembly had a reasonable basis to believe that federal law required drawing House District 18 so that it continued to offer minorities in the southeastern part of the state the opportunity to elect a candidate of choice; otherwise the State would be vulnerable to a Section 2 Voting Rights Act claim. (Brief page 30, 3/8/05)***

At the outset, the Court notes that it is not "bound or hog-tied" by the issues as framed by the parties. The Court's responsibility is to review House District 18 as drawn by the General Assembly under the 2003 House Redistricting Plan and to determine, based on the evidence presented, whether or not House District 18 was drawn in violation of the North Carolina Constitution and the tenets set forth in ***Stephenson I***, ***Stephenson II*** and the applicable federal law.

In ***Stephenson I***, the Supreme Court stated:

> *On remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative*

> *redistricting plans and the VRA districts contained therein, on 11 February 2002. This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand,* ***we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters.*** *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP as herein established for all redistricting plans and districts throughout the State.* ***(emphasis added) 355 N.C. 383***

House District 18, as presently and previously drawn, was denominated by Judge Jenkins and the General Assembly as a VRA District. House District 18, as were its predecessors in all of the redistricting plans since 1992, is a single member district. Since present House District 18 and its predecessor Districts were not located in Section 5 VRA counties, House District 18 was identified as a VRA district under Section 2 of the VRA.

It is undisputed that the North Carolina General Assembly, with the consent of Representative Wright, wanted to maintain House District 18 as an effective

black voting district so as to avoid a challenge under Section 2 of the VRA in the event the redistricting plan failed to contain an effective black voting district in the southeastern portion of North Carolina similar to former House District 98.

While the General Assembly and its redistricting plan must be given great deference, the intent to create a Section 2 VRA district to comply with federal law and the designation of House District 18 as a Section 2 VRA district does not, in and of itself, answer the question presented. House District 18 must be, in fact and in law, a Section 2 VRA district.

As a result, this Court must look to the United States Supreme Court for guidance relative to the requirements and limitations of Section 2 VRA districts.

This Court recognizes that ***Thornburg v. Gingles, 478 U.S. 30, 92 L. Ed. 2d, 25, 114 S. Ct. 2647 (1986)***, is the seminal decision on Section 2 claims under the VRA involving multi-member districts. Since ***Gingles*** there have been a number of cases that have discussed and refined issues relating to Section 2 claims in single-member districts, which is what House District 18 is relative to the ***Gingles*** decision.

Accordingly, pertinent parts of those Supreme Court Cases follow:

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Growe v. Emison, 507 U.S. 25, 122 L. Ed. 2d 388 (1993).

In this case, the United States Supreme Court addressed a Section 2 VRA claim as applied to a single member district and required that the *Gingles* threshold factors apply to a Section 2 VRA claim of vote dilution affecting a single-member district as well as to a multimember district.

> *Our precedent requires that, to establish a vote-dilution claim with respect to a multimember districting plan (and hence to justify a supermajority districting remedy), a plaintiff must prove three threshold conditions:*
> *First, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it .... usually to defeat the minority's preferred candidate.' **Gingles, 478 U.S., at 50-51, 92 L. Ed. 2d, 106 S. Ct. 2752.** We have not previously considered whether these Gingles threshold factors apply to a Section 2 dilution challenge to a single member districting scheme, a so called "vote fragmentation" claim. See id., at 46-47, n. 12, 92 L. Ed. 2d 25,106 S. Ct. 2752. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans,*

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> *generally pose greater threats to minority-voter participation in the political process than do single-member districts. (citations omitted)which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment. (citations omitted) It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single member district. Certainly the reasons for the three Gingles prerequisites to continue to apply:* ***The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of it own choice in some single-member district see Gingles, supra, at 50, n. 17, (other citations omitted). And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged district thwarts a distinctive minority vote by submerging it in a larger white voting population. (citation omitted). Unless these points are established, there neither has been a wrong nor can be a remedy. (emphasis added) 507 U.S. 39-41***

Voinovich v. Quilter, 507 U.S. 146 (1993).

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Voinovich followed on the heels of ***Crowe***. ***Voinovich*** considered whether or not Ohio's creation of several legislative districts dominated by minority voters violated Section 2 of the VRA. ***Voinovich*** is instructive on two fronts: first, for purposes of understanding the application of Section 2 to single-member districts and second, for its discussion of the power of the States in deciding their own legislative reapportionments.

> *Section 2 thus prohibits any practice or procedure that, "interact[ing] with social and historical conditions," impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. (citation omitted).*
>
> *A.*
>
> *In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines. A politically cohesive minority group that is large enough to constitute the majority in a single member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes a bloc against the minority candidate, the fragmented*

minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.

This case focuses not on the fragmentation of a minority group among various districts but on the concentration of minority voters within a district. How such concentration or "packing" may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates. As a result, we have recognized that "[d]ilution of racial minority group voting strength may be caused" either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."
507 U.S. 153-154

The practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts

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necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. ***Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice.*** *Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.* ***(emphasis added.) 507 U.S. 154-155***

Section 2 contains no per se prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based on partisan political concerns. Instead, Section 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the ***effect*** *of denying a protected class the equal opportunity to elect its candidate of choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to this matter. See 43 USC 1973 (b). ..... .*

The District Court's decision was flawed for another reason. By requiring the appellants to justify the creation of the majority-minority districts, the District Court placed the burden of justifying apportionment on the State. Section 2,

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however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders. Section 2(b) specifies that 2(a) is violated if "it is shown" that a state practice has the effect of denying a protected group equal access to the electoral process. (citation omitted) The burden of "show[ing]" the prohibited effect, of course, is on the plaintiff; surely Congress could not have intended the State to prove the invalidity of its own apportionment scheme. See Gingles, 478 U.S. 46 (citations omitted) (plaintiffs must demonstrate that the device results in unequal access to the electoral process) ..... . ***507 U.S. 155,156***

Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. See Growe, ante at 40-41 (citations omitted). ***But that does not mean that the State's powers are similarly limited. Quite the opposite is true: Federal Courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a***

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federal court." Growe, ante, at 34(citations omitted). 507 U.S. 156 ..... .

Had the District Court employed the Gingles test in this case, it would have rejected appellees' Section 2 claim. Of course, the Gingles factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first Gingles precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, arguendo, to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect the candidate of their choice with the assistance of cross over votes from the white majority. We need not decide how Gingles first factor might apply here, however, because appellees have failed to demonstrate Gingles' third precondition - sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting". 794 F. Supp. at 700-701. (citations omitted)

Here, as in Gingles, "in the absence of significant white block voting it cannot be said that the ability

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> *of minority voters to elect their chosen representatives is inferior to that of white voters." Gingles, 478 U.S. at 49, n. 15. . . . The District Court's finding of a Section 2 violation, therefore, must be reversed.* ***507 U.S. 158.***

SHAW V. HUNT, 517 U.S. 899, 135 L. ED. 2d 207 (1996).

This case involves the infamous North Carolina U.S. House District 12, sometimes known as the "chicken district" that ran east and west along Interstate 85. House District 12 was formed in response to the USDOJ's objections to North Carolina's 1991 Congressional Redistricting Plan under **now unenforceable** Attorney General regulations which required preclearance under Section 5 VRA review be withheld if there were Section 2 problems in the proposed redistricting plan.

> *With respect to Section 2, appellees contend, and the District Court found, that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under this section. Our precedent establishes that a plaintiff may allege a Section 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of*

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*districts, and thereby dilutes the voting strength of members of the minority. (citations omitted). To prevail on such a claim, a plaintiff must prove that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it ...usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); Growe v. Emison, 507 U.S. 25 (1993) (citations omitted). A court must also consider all other relevant circumstances and must ultimately find based on the totality of those circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice. [42 USC 1973(b)]." **517 U.S. 914***

*We assume, arguendo, for purpose of resolving this suit, that compliance with Section 2 could be a compelling interest, and we likewise assume, arguendo, that the General Assembly believed a second majority-minority district was needed in order not to violate Section 2, and that the legislature at the time it acted had a strong basis in evidence to support that conclusion. **517 U.S. 915***

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Where, as here, we assume avoidance of Section 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.

District 12 could not remedy any potential Section 2 violation. As discussed above, a plaintiff must show that the minority group is "geographically compact" to establish Section 2 liability. No one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. Therefore where that district sits, "there neither has been a wrong nor can be a remedy." Growe, supra, at 41 . ...

If a Section 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 USC 1973(b). The vote dilution injuries suffered by these persons are not remedied by creating a safe majority black district somewhere else in the State. For example, if a geographically compact, cohesive minority population lives in southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that Section

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> *2 violation. The black voters of south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was formed. District 12 would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish this goal.* ***517 US 916, 917***

This Court notes that House District 18's predecessor, House District 98, was created in response to the USDOJ's same preclearance Section 5 and 2 review and objections to the 1991 redistricting plan. House District 98, although not precisely aligned with the present, compact, two-county effective minority district of House District 18, was then thought to have been required under Section 2 of the VRA by the USDOJ for southeastern North Carolina. There was no challenge to House District 98 as a Section 2 VRA. Representative Wright was elected in 1992, 1994, 1996, 1998, and 2000 in a district created as a VRA district for purposes of Section 2 of the VRA and to alleviate the objections of the USDOJ under its regulatory scheme. A Section 2 VRA objection from the USDOJ is no longer appropriate to hold up a Section 5 VRA preclearance and has not been a stumbling block since 1996. Here's why.

Prior to the Supreme Court's decision in ***Reno v. Bossier Parish School BD, 520 U.S. 471 (1996)*** the Attorney General's regulations interpreting the VRA required that a proposed redistricting change be free

of discriminatory purpose and retrogressive effect (Section 5), but also if the Attorney General concluded that a "bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR Section 51.55(b)(2) (1996).

Section 5 of the VRA freezes election procedures in a "covered jurisdiction" until that jurisdiction proves that its proposed changes do not have the purposes and will not have the effect of denying or abridging the right to vote based on race.

Reno held, *inter alia*, that pre-clearance under Section 5 may not be denied solely on the basis that the new redistricting plan violates Section 2 of the VRA. In so holding, the Supreme Court struck down the Attorney General's regulation that required Section 5 preclearance to be withheld on the basis of a suspected Section 2 VRA violation. ***Reno***, supra, 520 U.S. 483-485.

"Preclearance under Section 5 affirms nothing but the absence of backsliding." ***Reno v. Bossier Parish School Bd., 528 U.S. 335***

As a consequence of the ***Reno*** decision, at the time of the 2000 census and its required redistricting plans, the USDOJ was no longer able to use its objections to redistricting plans on the basis of perceived Section 2 VRA violations.

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Simply put, the USDOJ did not have the jurisdiction or authority under its Section 5 review to pass on or object to the creation of House District 18 or to cloak House District 18 with a mantle of legitimacy as a Section 2 VRA district. Thus, the preclearance of North Carolina's 2003 House Redistricting Plan under Section 5 of the VRA did not provide one iota of cover for House District 18's designation as a VRA district under Section 2.

House District 18 must rise or fall on its ability to stand alone as a Section 2 VRA district and it must be able to meet the Section 2 elements as set forth above.

House District 18

It is undisputed that the General Assembly intended House District 18 to be created as a Section 2 VRA district and that the General Assembly believed that it was required to draw a Section 2 VRA district in the southeastern North Carolina Region in order to comply with Section 2 of the VRA.

Nothing in ***Stephenson I and II*** guarantees any county protection from being divided when necessary to comply with the VRA; one-man, one-vote; or other federal mandates.

The difficulty in analyzing and deciding this case is the posture in which House District 18 presents itself to the Court on two separate grounds:

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First, House District 18 was drawn as a "preemptive strike" against legislative concerns that, if a Section 2 VRA effective minority district was not maintained in the southeast to replace former House District 98, then there would be a lawsuit filed challenging the ***absence*** of an effective minority district in southeastern North Carolina on the basis of Section 2 of the VRA.

Having taken the initiative and created House District 18 as a Section 2 VRA district in this preemptive fashion, the BOE is in the unusual position of having to defend its decision as if it had the burden of proving that a Section 2 VRA violation would have occurred, in fact and as a matter of law, in the absence of the creation of House District 18.

Second, House District 18 is ***not*** a majority-minority district because of the number of black voters located therein. House District 18, at best, can be described as an "ability to elect" or "coalition" district. An "ability to elect district" is a district where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority with a single district in order to elect candidates of their own choice." ***Georgia v. Ashcroft, 539 U.S. 461, 481 (2003).***

Pender County's able and competent counsel goes for the jugular on this very point and argues that under the first prong of the ***Gingles*** threshold test as

interpreted by the United States Court of Appeals in ***Hall v. Virginia, 385 F.3d 421 (4th Cir. 2004)***, a district in which black voters do not form a numerical majority cannot maintain a Section 2 VRA claim in the first place.

> *The district court dismissed the complaint on the grounds that the plaintiffs could not satisfy the requirements established in* ***Thornburg v. Gingles*** *that a minority group seeking relief under Section 2 "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. 30,50 (1986). Because we agree that Gingles establishes a numerical majority requirement for all Section 2 claims, we affirm the order of the district court dismissing the complaint with prejudice."* ***Hall, at p 2. slip op.***

If this Court agrees with the Fourth Circuit's imposition of the first prong of ***Gingles*** as a "bright line" requirement that the minority group seeking Section 2 VRA relief must be a numerical majority, then this case is over and District 18 as presently drawn is "toast" because House District 18 is not a numerical majority black voter district. The easy way out for the Court would be to stop here, run for cover using ***Hall*** for protection, and grant summary judgment. To take such action under the particular facts presented, however, would be a shameful

example of judicial irresponsibility and this Court rejects the carrot dangled by the ***Hall*** decision.

After careful consideration of the undisputed facts pertaining to House District 18 and hours of "eye straining" review of the many United States Supreme Court decisions which followed ***Gingles*** into the murky legal quagmire of Section 2 of the VRA, this Court must respectfully disagree with the Fourth Circuit's imposition of a "bright line" requirement that a minority group seeking Section 2 VRA relief must constitute (literally) a numerical majority of black population and/or black voting age population.

Furthermore, this Court is not bound by a decision of the Fourth Circuit, only by a decision of the United States Supreme Court. **State v. McDowell, 310 N.C. 61, 74 (1984).**

With all due respect, a "bright line test" requiring a voting age majority of minority voters to be present in a single-member district has not yet been etched in stone by the Supreme Court of the United States. Until that day comes, this Court is free to consider the issue of whether or not black voters in House District 18 have the potential, on the strength of their own ballots, to elect candidates of their own choice.

This Court is of the opinion that the first ***Gingles*** precondition for establishing a Section 2 VRA claim - that a minority must be able to constitute a "majority"

in a single member district - depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district.

The proper factual inquiry in analyzing a "coalition" or an "ability to elect district", in our opinion, is not whether or not black voters make up the majority of voters in the single-member district, but whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a ***de facto*** majority that can elect candidates of their own choosing. Put another way, we believe the proper inquiry is whether the black voters in the district possess the political ability, through the voting booth, to elect candidates of their own choice.

As a matter of practical common sense, such an inquiry must focus on the ***potential of black voters to elect representatives of their own choosing*** not merely on sheer numbers alone. Potential is not a "new" word that this Court has plucked out of thin air. Potential has been a frequently used term within the context of Section 2 VRA analysis.

The United States Supreme Court in ***Growe***, supra, at 40, noted that a minority group claiming to have had its voting power diluted in violation of

Section 2, must establish that the group "has the ***potential*** to elect a representative of its own choice in some single-member district."

Even in ***Gingles***, potential was used: "[u]nless minority voters possess the ***potential*** to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." ***Gingles***, supra at 50, n.17. (emphasis added.)

Accordingly, in the event that this Court's inquiry reveals that blacks constitute a ***de facto*** majority with the potential to elect candidates of their own choice because of the political realities present in the district, then and in that event the ***de facto*** majority black voters present in the district would be present in sufficient numbers to satisfy the "majority" requirement in ***Gingles***, as that ***de facto*** majority would possess the potential political power to elect a representative of its own choice in House District 18.

This Court concludes that employing a practical, common sense approach to the facts related to House District 18 has support outside of the Fourth Circuit. The United States Court of Appeals for the First Circuit in the case of ***Metts v. Murphy, 363 F.3d 8 (1st Cir. 2004)*** discussed the first prong of ***Gingles*** and stated:

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First, several Supreme court opinions after ***Gingles*** *have offered the prospect, or at least clearly reserved the possibility that Gingles' first precondition - that a racial minority must be able to constitute a "majority" in a single-member district - could extend to a group that was a numerical minority but had predictable cross-over support from other groups. (citations omitted) "[T]he first Gingles precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, arguendo, to be actionable today." Further, the Court has so far reserved judgment on a second-cousin question: whether dilution of a minority racial group's influence, as opposed to the power to elect, could violate section 2- a position that would require substantial modification of Gingles' first-prong "majority" precondition. Growe, 507 U.S. at 41, n. 5.*

Second, where single member districts are at issue - as in our case - opinions have increasingly emphasized the open-ended, multi-factor inquiry that Congress intended for section 2 claims. (citations omitted) To say that Gingles applies as a precondition to section 2 liability may not tell one very much if Gingles itself is no longer to be "mechanically" applied ..... .

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> *[2] It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss. This caution is especially apt where, as here, we are dealing with a major variant not addressed in* ***Gingles*** *itself- the single member district - and one with a relatively unusual history .....*
>
> *We are thus unwilling at the complaint stage to foreclose the possibility that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 per-cent. Yes, one would ordinarily expect the consequences to be small, but not always, and arguably not here (based on past history). At this point we know practically nothing about the motive for the change in the district or the selection of the present configuration, the contours of the district chosen or the feasible alternatives, the impact of alternative districts on other minorities, or anything else that would help gauge how mechanically or flexibly the* ***Gingles*** *factors should be applied.* ***363 F.3rd 11,12.***

With the foregoing comments in mind, the Court will now examine the undisputed evidence related to House District 18 and determine whether or not House District 18, as presently constituted, is a ***de facto***

black majority district under a Section 2 VRA analysis sufficient to meet the first prong of ***Gingles***.

Past election results in North Carolina demonstrate that districts with a black voting age population (BVAP) of 37.81% and above can provide an effective opportunity for the election of black candidates.

In North Carolina, a ***more important indicator of effective black voting strength is the percentage of registered Democrats who are black.***

Using the 2000 Census data, District 18 had total voter registration total of 38,850. Of this number, Democratic voters comprised 22,960 (59.01%) an overwhelming majority. Republican voters comprised 9,285 (23.99%) and Unaffiliated voters comprised 6,437 (16.57%).

District 18 has a total black population of 27,023 (42.89%), a black voting age population of 19,173 (39.36%) and a black Democratic voter registration of 12,334 (53.72%). With the majority of Democratic voters being black, it is not rocket science to conclude that the candidate in the Democratic primary for House District 18 who will be successful in that primary will be the black Democratic voters' candidate of choice.

The election results for 2004 in District 98 are the proof in the pudding that Representative Wright, a

black Democrat, had the best chance of winning the House seat in District 18 because he would win the party primary, if one was held, and face a General Election minority of Republican (23.99%) and/or combination of unaffiliated voters (16.57%) whose combined total was less than 41% of the registered voters in the district.

The fact of the matter is that Representative Wright had no primary opposition and no Republican opposition in the General Election in 2004. The reason no Republican ran is also not rocket science. In the General Election, the Democratic voters, without regard to race, make up 59.01% of the total voters in District 18. It is clear that Representative Wright is the black voters' candidate of choice and that they have, in House District 18, the ability to elect him to office in the General Election by means of the Democratic primary and the Democratic party.

There has been no evidence presented to contradict these facts from the undisputed evidence in the record, or to call into question the only reasonable conclusion that can be drawn from the present configuration of House District 18: House District 18 is geographically compact and politically cohesive among the registered Democratic voters to be an effective, viable "ability to elect district" that is, a "coalition district" where Democrats vote for the Democratic candidate who wins the party primary and ***a de facto majority*** district for black voters who are able to elect the representative of

their choice to the North Carolina House of Representatives.

Accordingly, this Court concludes as a matter of law that House District 18, as presently drawn, contains a black voting age population that is "sufficiently large and geographically compact" so as to constitute a majority in House District 18 which has potential and the proven ability to elect its candidate of choice to the North Carolina House of Representatives.

Representative Thomas Wright is clearly the candidate of choice of black voters in House District 18, as presently constituted, and as well in the previous districts.

This Court therefore concludes as a matter of law that House District 18, as presently drawn, satisfies the first two ***Gingles*** threshold conditions for a Section 2 VRA claim as set out below:

First, that the black voters in House District 18 are a sufficiently large and geographically compact group so as to constitute a majority in the single-member district; and

Second, that the black majority voters are politically cohesive within the majority Democratic party in House District 18 and that within the Democratic party the voters are politically cohesive.

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In making these conclusions, the Court has considered all of the undisputed evidence of record, including the prior voting patterns of House District 98 and Interim House District 18, as well as the evidence discussed above relative to present House District 18.

This Court, upon careful consideration of the evidence presently before the Court relating to the third prong of ***Gingles*** -- requiring that there be sufficient white majority bloc voting to impair the ability of black voters to elect their chosen representatives - ***Gingles***, 478 U.S. at 49, n. 15. - is of the opinion that there more likely than not exist genuine issues of material fact on this question.

At the very least, given this Court's determination that the first two prongs of ***Gingles*** have in fact and in law been satisfied with respect to House District 18's qualification as a Section 2 VRA district, it would be in the interests of justice and fair play to provide both sides an opportunity to present evidence on this Third prong and also on the "totality of the circumstances" of Section 2 of the VRA.

This is because proof of the ***Gingles*** preconditions is not alone enough to establish proof that House District 18 is a Section 2 VRA district. "The ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the 'totality of the circumstances." ***Lewis v. Alamance County, 99 F. 3d 600, 604 (4th Cir. 1996).***

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Reduced to essentials, the Court's decision is as follows:

First, the Court will dismiss Pender County and the plaintiff-commissioners in their official capacities, leaving the individual plaintiffs to prosecute the remainder of this action.

Second, the Court, having declared that House District 18, as presently drawn, meets the first and second ***Gingles*** preconditions, will grant partial summary judgment in favor of the BOE on those issues and will deny Pender County's motion for summary judgment.

Third, the Court, having determined that there are questions of material fact that may be in dispute relating to the racial bloc voting third ***Gingles*** precondition and that the Court would like to provide the parties an opportunity to focus the evidence on this issue and also on the "totality of the circumstances" required in any Section 2 VRA analysis, will make no ruling affecting those issues and will, after a status conference, schedule an evidentiary hearing on the remaining issues.

Fourth, after hearing evidence on the remaining issues, the Court will resolve any disputes of fact, and enter its final judgment accordingly.

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IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. **That Pender County lacks standing to bring this action against the State of North Carolina defendants and is hereby dismissed as a party to this action.**
2. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland, and Eugene Williams, in their official capacities as County Commissioners of Pender County, lack standing to bring this action against the State of North Carolina defendants and they are hereby dismissed, in the official capacities, as parties to this action.**
3. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Williams, as indvidual citizens and voters of Pender County, have standing to bring this action and they remain as plaintiff parties to this action.**
4. **That House District 18, as presently constituted, meets the first two (2) threshold tests set out in Thornburg v. Gingles, supra., in that based on the undisputed evidence of record and the law: (1) House District 18 has a black minority population that is sufficiently large and geographically compact as to constitute a de facto majority in that single member district and (2) House**

District 18's black minority group is politically cohesive.

5. **That the Court has determined that material issues of fact remain in dispute as relates to the third (3) Gingles threshold test relating to whether or not there is "racially polarized voting" and as relates to the "totality of circumstances" as to whether or not the members of the black minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their own choosing as required under 42 USC 1973(b) to establish a Section 2 VRA district. See Shaw v. Hunt, supra at 517 US 914.**
6. **That Pender County's (Plaintiffs') Motion for Summary Judgment on the grounds that House District 18, as presently constituted, cannot comply with Section 2 of the Voting Rights Act, is denied for the reasons set forth in this Memorandum of Decision and Order.**
7. **That the BOE (State of North Carolina defendants) Motion for Summary Judgment on the grounds that House District 18, as presently constituted, complies with Section 2 of the Voting Rights Act is allowed in part and denied in part for the reasons set forth in this Memorandum of Decision and Order.**
8. **That the Court will conduct a scheduling conference with the remaining parties' counsel within 10 days of the date of this**

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Memorandum of Decision and Order regarding the trial of the remaining issues in this case. It is the intent of this Court that the remaining issues will be set for an evidentiary hearing in the first part of January, 2006.

This the 2nd of December, 2006.

/s/ W. Erwin Spainhour **/s/ H. E. Manning, Jr.**
W. Erwin Spainhour **H.E. Manning Jr.**

/s/ Quentin T. Sumner
Quentin T. Sumner

Three-Judge Panel for Redistricting Challenges G.S.1-267.1

Certificate of Service

This is to certify that a copy of the foregoing Memorandum of Decision and Order Re: Summary Judgment was served this date on counsel for the parties by facsimile as permitted by the North Carolina Rules of Civil Procedure as follows:

Alexander McC. Peters (Special Litigation) at 919-716-6763 Counsel for State Defendants (BOE)

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Carl W. "Trey" Thurman (Pender County) at 910-763-7476 Counsel for Plaintiffs

This the 2d day of December, 2005.

/s/ Howard E. Manning, Jr.
Howard E. Manning, Jr.
Superior Court Judge

Pender County v. Bartlett,
Wake County Superior Ct., Final Judgment, Jan. 9, 2006

IN THE GENERAL COURT OF JUSTICE

NORTH CAROLINA

WAKE COUNTY
SUPERIOR COURT DIVISION

04 CVS 0696

PENDER COUNTY, *et al.*,

Plaintiffs,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections, *et al.*,

Defendants.

MEMORANDUM OF DECISION AND JUDGMENT

THIS MATTER is before the Court for entry of final judgment upon plaintiffs' claims for permanent injunctive relief to forbid the use of House Districts 16 and 18 as currently constituted under the North Carolina General Assembly's November 25, 2003, legislative redistricting plan.

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Procedural Background

This case was instituted on May 14, 2004, by the filing of a complaint in the Superior Court of Wake County. The subject matter of the case involves a legal challenge by Pender County and the other named plaintiffs to portions of the N.C. House of Representatives' legislative redistricting plan adopted by the North Carolina General Assembly on November 25, 2003.

Pender County has been divided between two House Districts in the 2003 Redistricting Plan. Pender County contends that this division violates the Whole County Provision (WCP) of the North Carolina Constitution as defined in ***Stephenson v. Bartlett, 355 N.C. 354*** (2002) (***Stephenson I***) and ***Stephenson v. Bartlett, 357 N.C. 301*** (2003) (***Stephenson II***).

N.C.G.S. 1-267.1 requires that lawsuits seeking to challenge legislative redistricting plans be filed in the Superior Court of Wake County and that such challenges be heard by a Three-Judge Panel appointed by the Chief Justice of the State of North Carolina.

Chief Justice I. Beverly Lake, Jr., signed an Order dated May 24, 2004, appointing the Three-Judge Panel for Redistricting Challenges as defined in G.S. 1-267.1 to hear and determine the action challenging that portion of the 2003 Legislative Redistricting Plan relating to House seats in North Carolina House

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Wake County Superior Ct., Final Judgment, Jan. 9, 2006

Districts 16 and 18 (Pender and New Hanover Counties).

The BOE filed an Answer on June 4, 2004, asserting as one of many defenses, that the division of Pender County into two House districts was required by federal law, the supremacy of which under the federal and state constitutions was specifically acknowledged in ***Stephenson I and II.***

The BOE contended that House District 18 was drawn for the purpose of providing black voters in Pender and New Hanover Counties an equal opportunity to elect a candidate of their choice in order to comply with Section 2 of the Voting Rights Act ("VRA").

On June 11, 2004, Pender County filed a motion for preliminary injunction and motion for summary judgment on permanent injunction seeking to enjoin the defendants from proceeding with primary and general elections for the 16th and 18th North Carolina House Districts as they now exist under the November 25, 2003, legislative redistricting plans adopted by the North Carolina General Assembly.

The Three-Judge Panel scheduled a hearing on the motion for preliminary injunction for Friday, June 25, 2004. The parties submitted affidavits, stipulations of fact, and memoranda of law several days prior to the hearing on the motion for preliminary injunction.

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The hearing was held as scheduled on June 25, 2004. The Three-Judge Panel advised that it would only consider the issue of whether or not a preliminary injunction should issue to stop the election process. The parties made oral arguments and the Three-Judge Panel recessed for two hours to consider the matter. The Three-Judge Panel reconvened to announce its unanimous decision in open court and denied the motion for preliminary injunction. A written summary of the decision was provided to the parties, filed with the Clerk of Superior Court of Wake County and provided that a written order would follow in due course.

There was no request from the parties for findings by the Three-Judge Panel pursuant to Rule 52, North Carolina Rules of Procedure and thus findings of fact and conclusions of law are not required when a motion for preliminary injunction is denied. The Three-Judge Panel entered its Order denying Pender County's motion for preliminary injunction in September, 2004.

On February 25, 2005, the parties filed cross motions for summary judgment. Thereafter, the parties filed Stipulations of Fact and Amended Stipulations of Fact (April 27, 2005) together with briefs and reply briefs in support of their respective positions.

On July 14, 2005, the Three-Judge Panel noticed the motions for summary judgment for hearing on

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Tuesday, August 30, 2005. On August 30, 2005, the parties presented their arguments before the Three-Judge Panel and the Panel took the motions under advisement.

On December 2, 2005, this Court entered a Memorandum of Decision and Order Re: Summary Judgment. The Court ruled in pertinent part as follows:

1. **That Pender County lacks standing to bring this action against the State of North Carolina defendants and is hereby dismissed as a party to this action.**
2. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland, and Eugene Williams, in their official capacities as County Commissioners of Pender County, lack standing to bring this action against the State of North Carolina defendants and they are hereby dismissed, in the official capacities, as parties to this action.**
3. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Williams, as indvidual citizens and voters of Pender County, have standing to bring this action and they remain as plaintiff parties to this action.**
4. **That House District 18, as presently constituted, meets the first two (2)**

threshold tests set out in Thornburg v. Gingles, supra., in that based on the undisputed evidence of record and the law: (1) House District 18 has a black minority population that is sufficiently large and geographically compact as to constitute a *de facto* majority in that single member district and (2) House District 18's black minority group is politically cohesive.

5. That the Court has determined that material issues of fact remain in dispute as relates to the third (3) Gingles threshold test relating to whether or not there is "racially polarized voting" and as relates to the "totality of circumstances" as to whether or not the members of the black minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their own choosing as required under 42 USC 1973(b) to establish a Section 2 VRA district. See Shaw v. Hunt, supra at 517 US 914.

Accordingly, Pender County's (Plaintiffs') Motion for Summary Judgment on the grounds that House District 18, as presently constituted, cannot comply with Section 2 of the Voting Rights Act, is denied and the BOE

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> **(State of North Carolina defendants) Motion for Summary Judgment on the grounds that House District 18, as presently constituted, complies with Section 2 of the Voting Rights Act is allowed in part and denied in part for the reasons set forth in this Memorandum of Decision and Order.**

(Memorandum of Decision and Order Re: Summary Judgment, December 2, 2005, page 32)

Because the Memorandum of Decision and Order Re: Summary Judgment did not dispose of all claims and the Court determined that there were issues of fact to the third prong of ***Gingles*** and the "totality of circumstances" under 24 USC 1973(b), the MDO was interlocutory.

Following the MDO, a status conference was held to determine a hearing date for the Panel to hear evidence on the two (2) remaining issues relating to the Section 2 VRA status of House District 18. Counsel for the parties advised that they believed they could enter into a stipulation relating to the evidence in the record that would support the remaining issues to be decided before final judgment could be entered.

Thereafter, on January 5, 2006, counsel for both sides agreed on a **Joint Stipulation of the Parties** and furnished a copy to the Panel. The original was filed on January 9, 2006. As part of the Joint Stipulation,

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"Plaintiffs hereby advise the court that they do not wish to be heard further or to present evidence regarding the remaining issues, although plaintiffs intend to proceed with an appeal of the adverse holdings in the court's Memorandum and Order of 2 December 2005." (Joint Stipulation, page 2)

The Court, after examining the Joint Stipulation of the Parties as well as the undisputed facts of record and prior stipulations of the parties, is of the opinion that there are no issues of material fact to be decided by the Panel and that no further evidentiary hearings are requested or required and thus, this matter is ripe for entry of final judgment.

In addition to those findings and conclusions set forth in ***The Memorandum of Decision and Order Re: Summary Judgment*** entered in this case on December 2, 2005, the Court based on the undisputed facts of record and the stipulations of the parties, has considered the following additional relevant facts and circumstances:

(1) For many decades African-Americans in North Carolina, including the African-American minorities in Pender and New Hanover counties, were victims of racial discrimination. There is plenary evidence of racial discrimination in this record to support this finding.

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(2) A substantial number of the African-American citizens in Pender and New Hanover Counties were still at a disadvantage in comparison to white citizens in Pender and New Hanover counties with regard to income, housing, education, and health which hindered their ability to participate effectively in the political process and elect representatives of their own choosing.

(3) Other than House District 18 and its predecessor districts, there was no house district in which African-Americans had an opportunity to elect a Representative of their own choosing to the House of Representatives from southeastern North Carolina.

(4) The African-American populations in Pender and New Hanover counties, which include those African-Americans within House District 18, are politically cohesive.

(5) Racially polarized voting existed in Pender and New Hanover Counties so that African-American candidates usually were overwhelmingly the choice of African-American voters, but were not the choice of non-African American voters.

(6) The racial difference in the preference of voters in Pender and New Hanover counties resulted in the white majority voting sufficiently as a block to usually enable the white majority to defeat the African-American minority's preferred candidate.

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(7) At the time of the enactment of the 2003 House Redistricting Plan, there was a strong basis in fact for the General Assembly to have reasonably believed that House District 18 should be drawn in order to comply with Section 2 of the VRA.

(8) That House District 18, as presently constituted, satisfies the three-prong factual threshold inquiry required by ***Gingles***, in that (1) House District 18 has a black minority population that is sufficiently large and geographically compact as to constitute a de facto majority in that single member district; (2) House District 18's black minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it.....usually to defeat the black minority's preferred candidate. ***Thornburg v. Gingles, 478 U.S. 30, 50-52 (1986); Growe v. Emison, 507 U.S. 25 (1986).***

In conclusion, this Court has considered all of the foregoing and all other relevant circumstances as they existed at the time of the enactment of the 2003 House Redistricting Plan as related to House District 18 and finds, based on the totality of those circumstances, that the African-American minority in Pender and New Hanover counties living in House District 18 had less opportunity than other members of the electorate to participate in the political process and to elect a representative to the North Carolina House of Representatives of their choice.

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Accordingly, this Court concludes as a matter of law:

(A) That House District 18 was required to be drawn as it was under the 2003 House Redistricting Plan in order to provide the African-American minority in Pender and New Hanover counties living in House District 18 with an equal opportunity to participate in the political process as other members of the electorate and thus, an equal opportunity to elect a representative to the North Carolina House of Representatives of their choice as required by Section 2 of the VRA. 42 U.S.C. 1973(b)

(B) That the failure of the General Assembly to draw House District 18 as a ***de facto*** majority district in the 2003 House Redistricting Plan would have resulted in violation of Section 2 of the VRA and thus House District 18 was necessary in order to comply with Federal Law.

(C) That House District 18 is a valid Section 2 VRA district, drawn in accordance with the authority of the General Assembly of North Carolina to enact redistricting legislation and in compliance with the requirements of Section 2 of the VRA.

(D) That because House District 18 is a valid Section 2 VRA district, Pender and New Hanover counties could be split In accordance with the Supreme Court's interpretation of the Whole County Provision ("WCP")

of the North Carolina Constitution. ***Stephenson I, 355 N.C. 354, 383.***

(E) That House District 18 complies, to the maximum extent practicable, with the legal requirements of the WCP as established in ***Stephenson I.***

(F) That House District 18 is in conformity with the North Carolina Constitution and its creation was a valid exercise of the redistricting authority of the North Carolina General Assembly.

Based upon the foregoing, the entry of a final judgment is appropriate at this time.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Memorandum of Decision and Order Re: Summary Judgment entered December 2, 2005, is incorporated as part and parcel of this Memorandum of Decision and Judgment to the extent it is not inconsistent with this Memorandum of Decision and Judgment. Any part of said Memorandum of Decision and Order Re: Summary Judgment entered December 2, 2005 inconsistent with this Judgment is surplus and has no further force or effect.

2. That House District 18 is a valid Section 2 VRA district, drawn in accordance with the

authority of the General Assembly of North Carolina to enact redistricting legislation and in compliance with the requirements of Section 2 of the VRA.

3. That because House District 18 is a valid Section 2 VRA district, Pender and New Hanover counties could be split In accordance with the Supreme Court's interpretation of the Whole County Provision ("WCP") of the North Carolina Constitution. Stephenson I, 355 N.C. 354, 383.

4. That House District 18 complies, to the maximum extent practicable, with the legal requirements of the WCP as established in *Stephenson I.*

5. That House District 18 is in conformity with the North Carolina Constitution and its creation was a valid exercise of the redistricting authority of the North Carolina General Assembly.

6. That this action is dismissed.

7. That in the discretion of the Court, the parties shall bear their own costs.

This the 9th day of January, 2006.

/s/W. Erwin Spainhour /s/H. E Manning,Jr.

Pender County v. Bartlett,
Wake County Superior Ct., Final Judgment,
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W. Erwin Spainhour **H.E. Manning, Jr.**

/s/Quentin T. Sumner
Quentin T.Sumner

Three-Judge Panel for Redistricting Challenges
G.S.1-267.1

Pender County v. Bartlett,
Wake County Superior Ct., Final Judgment, Jan. 9, 2006

Certificate of Service

This is to certify that a copy of the foregoing memorandum of Decision and Judgment was served this date on counsel for the parties by facsimile as permitted by the North Carolina Rules of Civil Procedure as follows:

Alexander McC. Peters (Special Litigation) at 919-716-6763 Counsel for State Defendants (BOE)

Carl W. "Trey" Thurman (Pender County) at 910-763-7476 Counsel for Plaintiffs

This the 9th day of January, 2006.

/s/ Howard E. Mannign, Jr.
Howard E. Manning, Jr.
Superior Court Judge

42 U.S.C. § 1973 (2000)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 20. ELECTIVE FRANCHISE
ENFORCEMENT OF VOTING RIGHTS

Sec. 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have

42 U.S.C. § 1973 (2000)

members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.S. § 1973c (LexisNexis Supp. 2007)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 20. ELECTIVE FRANCHISE ENFORCEMENT OF VOTING RIGHTS

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the

42 U.S.C.S. § 1973c (LexisNexis Supp. 2007)

third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to

42 U.S.C.S. § 1973c (LexisNexis Supp. 2007)

enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

N.C. CONST. art. II, § 3

CONSTITUTION OF NORTH CAROLINA
ARTICLE II. LEGISLATIVE

Sec. 3. Senate districts; apportionment of Senators

The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. CONST. art. II, § 5

CONSTITUTION OF NORTH CAROLINA
ARTICLE II. LEGISLATIVE

Sec. 5. Representative districts; apportionment of Representatives

The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;

(2) Each representative district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a representative district;

(4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

***Pender County v. Bartlett*, Wake County Superior Ct., No. 04 CVS 0696, Joint Stipulations of the Parties, Dec. 5, 2005**

IN THE GENERAL COURT OF JUSTICE

NORTH CAROLINA

WAKE COUNTY
SUPERIOR COURT DIVISION

04 CVS 0696

PENDER COUNTY, *et al.*,

Plaintiffs,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections, *et al.*,

Defendants.

JOINT STIPULATIONS OF THE PARTIES

NOW COME the parties in the above-captioned case and stipulate the following for purposes of resolving the undecided issues in this case:

On 2 December 2005, the three judge panel issued its Memorandum of Decision and Order Re: Summary Judgment. The order held that Pender County and the

plaintiff County Commissioners in their official capacities lacked standing to bring this action. The court also held that House District 18 as presently constituted meets the first two threshold tests set out in *Thornburg v. Gingles* in that based on the undisputed evidence of record and law the district has a black minority population sufficiently large and geographically compact to constitute a *de facto* majority in that single member district and the district's minority group is politically cohesive. The court, however, determined there may exist genuine issues of material fact regarding the third *Gingles* threshold test relating to whether or not there is racially polarized voting and relating to the totality of the circumstances as to whether or not the members of the black minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their own choosing. Consequently the court left these remaining issues for final determination after an evidentiary hearing as necessary.

Defendants have presented evidence they contend shows that there was a strong basis for the General Assembly to have believed at the time of the enactment of the 2003 House Redistricting Plan that House District 18 should be drawn to comply with Section 2 of the Voting Rights Act. Plaintiffs stipulate that the evidence presented by the defendants is sufficient to support a finding of fact that the African-American populations in Pender and New

***Pender County v. Bartlett*, Wake County Superior Ct., No. 04 CVS 0696, Joint Stipulations of the Parties, Dec. 5, 2005**

Hanover counties are politically cohesive and racially polarized voting exists in Pender and New Hanover counties so that African-American candidates usually are overwhelmingly the choice of African-American voters, but are not the choice of non-African-American voters. Plaintiffs further stipulate that the evidence presented by the defendants is sufficient to support a finding of fact that the racial difference in the preference of voters results in the white majority voting sufficiently as a block to usually enable it to defeat the minority's preferred candidate.

The plaintiffs also stipulate that the evidence presented by the defendants is sufficient to support a finding of fact that for many decades African-Americans in North Carolina, including minorities in Pender and New Hanover counties, were victims of racial discrimination and a substantial number of the African-American citizens in Pender and New Hanover counties are still at a disadvantage in comparison to white citizens with regard to income, housing, education and health which hinders their ability to participate effectively in the political process and elect representatives of their own choosing.

Plaintiffs hereby advise the court that they do not wish to be heard further or to present evidence regarding the remaining issues, although plaintiffs do intend to proceed with an appeal of the adverse holdings in the court's Memorandum and Order of 2 December 2005.

***Pender County v. Bartlett*, Wake County Superior Ct., No. 04 CVS 0696, Joint Stipulations of the Parties, Dec. 5, 2005**

The parties agree that, based on the foregoing stipulations, there exist no genuine questions of material fact on the issues remaining for decision in this case and the Court accordingly may enter its final judgment on the merits.

Respectfully submitted, this the 5th day of December, 2005.

/s/ Carl W. Thurman III
CARL W. THURMAN III
N. C. State Bar No. 17106

3169 Wrightsville Ave.
Wilmington, NC 28403
Telephone: (910) 763-7487
Facsimile: (910) 763-7476

Counsel for the Plaintiffs

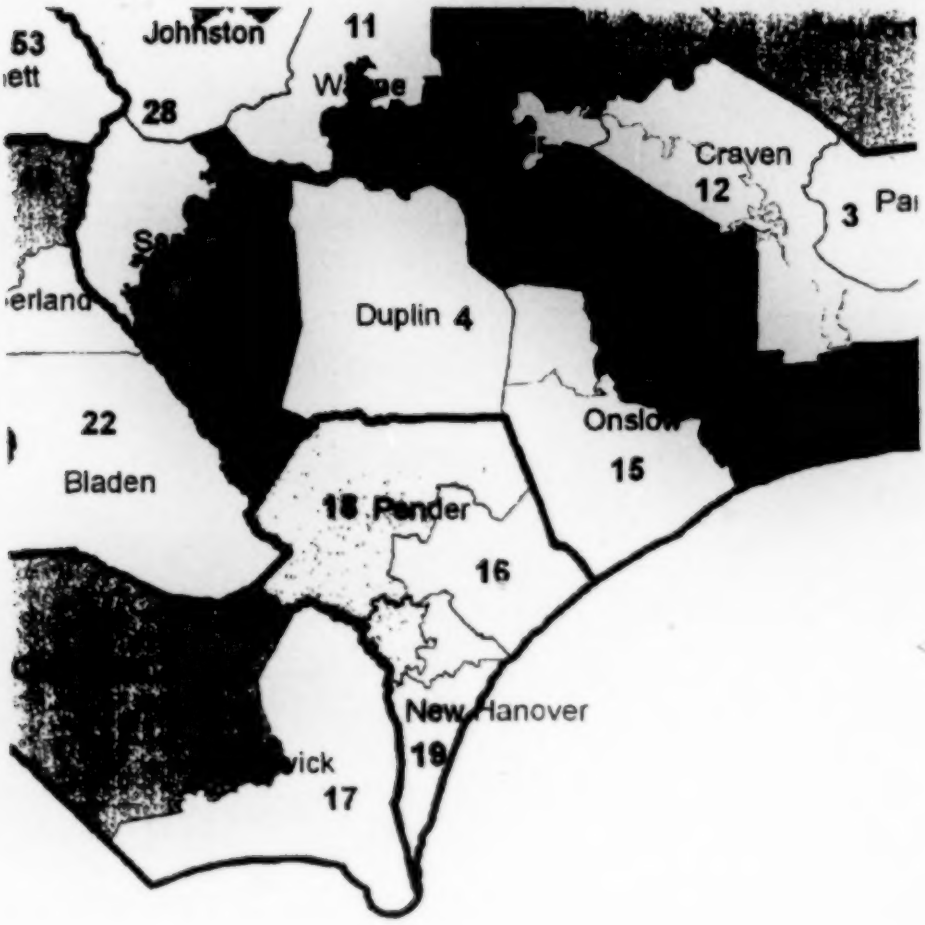
ROY COOPER
Attorney General

/s/ Alexander McC. Peters
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No.7119

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone:(919) 716-6900
Facsimile: (919) 716-6763
Counsel for the Defendants

2003 N.C House Districts
(southeastern portion of North Carolina)



***Pender County v. Bartlett*, Wake County Superior Ct., No. 04 CVS 0696, Aff. of Rep. Martha B. Alexander, June 9, 2004**

IN THE GENERAL COURT OF JUSTICE

NORTH CAROLINA

WAKE COUNTY
SUPERIOR COURT DIVISION

04 CVS 0696

PENDER COUNTY, *et al.*,

Plaintiffs,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections, *et al.*,

Defendants.

AFFIDAVIT OF REPRESENTATIVE MARTHA B. ALEXANDER

Representative Martha B. Alexander, being first sworn, deposes and says:

1. I am the duly elected Representative from House District 106 in Mecklenburg County and am serving my sixth term in the North Carolina House of Representatives. I was first elected in November, 1992

and began serving in 1993. I am a registered Democrat.

2. I was appointed by the Co-Speakers of the North Carolina House to serve as Co-Chair of the House Legislative Redistricting Committee on February 25, 2003. The Republican Co-Chair appointed at that same time was Representative Rick L. Eddins from Wake County.

3. Prior to the Special Session in November, 2003, when the 2003 House Plan was enacted, all black Representatives were consulted about the effect of the *Stephenson I* and *II* opinions and the redrawing of their legislative districts. This consultation was part of my effort to assure that the plan complied with the Voting Rights Act ("VRA"). Because all of the House minority members are Democrats, they each met separately with Speaker James B. Black and/or me to discuss their districts. Although the boundaries of some minority districts were established with a single redistricting meeting in which we looked at a proposed map of each district and the proposed district's demographics and election history, typically several meetings were held as the boundaries of the districts were discussed and modified in a back-and-forth process. This process continued until most Representatives were reasonably satisfied and it was felt the individual districts and map as a whole met the requirements of state and federal law. I worked closely with the Legislative Black Caucus leadership

and members to draw districts that reasonably maintain the opportunity of racial minorities to effectively exercise their right to vote and to elect representatives of their choice.

4. In drawing minority districts, compromises had to be struck in order to comply with §§ 2 and 5 of the Voting Rights Act and also the Whole County Provisions ("WCP") of the North Carolina Constitution as interpreted by the Supreme Court of North Carolina in the *Stephenson* opinions. The Court's opinions require a redistricting plan to comply with the VRA and that the VRA districts comply with the whole county provisions "to the maximum extent practicable."

5. The 2003 House Plan includes ten majority - black total population ("BPOP") districts and one majority-Native American total population ("NAPOP") districts in counties covered by § 5 of the VRA. There are also two House districts with over 40% BPOP in § 5 counties. This plan received § 5 preclearance by the United States Department of Justice on March 30, 2004.

6. The 2003 House Plan also includes four majority-black (BPOP) and four over 40% BPOP House districts in areas of the state not covered by § 5, but subject to § 2 of the VRA. Among these districts is House District 18, which was drawn in Pender and

New Hanover Counties in order to maintain the district as an effective black VRA district.

7. Past election results in North Carolina demonstrate that House districts with a BPOP of 41.54% and above or a black voting age population ("BVAP") of 38.37% and above can provide an effective opportunity for the election of black candidates. See Attachment A. An important indicator of effective black voting strength we considered when drawing districts was the percentage of registered Democrats who are black. In past elections, districts with black Democratic registration as low as 52.58% in District 18 and as high as 78.87% in District 60 have elected black Representatives. See Attachment B.

8. The ability of black voters to elect black candidates has also been shown to exist in congressional districts with less than a 50% BVAP. In 1998, under a plan drawn to satisfy the ruling of the three-judge federal court in *Cromartie* - - a judgment subsequently reversed by the United States Supreme Court - - the black population in District 1 was reduced to 50.27% BPOP and 43.54% BVAP, and in District 12 was reduced to 35.58% BPOP and 32.56% BVAP. Both black incumbents were re-elected. In the 2000 election, held under the legislature's 1997 Congressional Plan, black incumbents were again re-elected in District 1 (50.27% BPOP, 46.54% BVAP) and District 12 (46.67% BPOP, and 43.36% BVAP). In the new districts drawn after the 2000 Census, black

incumbents continued to run successfully in the 2002 elections in District 1 (50.71% BPOP, 47.82% BVAP) and District 12 (45.02% BPOP, 45.56% BVAP).

9. In the trial court's 2002 Interim Plan, House District 18 was maintained as an effective black district with a BPOP of 47.52%, BVAP of 43.52% and 52.58% black Democratic registration. Representative Thomas E. Wright was re-elected under the Interim Plan. He has served six terms in the House of Representatives and was first elected to the House in the 1992 election, the same year I won my first election. However, the district as drawn by the court divided the three counties of New Hanover, Brunswick and Columbus and required a four-county group consisting of Pender, New Hanover, Brunswick and Columbus Counties. The state courts considered a similar configuration in the legislatively drawn 2002 Plan to be non-compact.

10. In drawing the 2003 House Plan, it was possible to maintain an effective black district by keeping District 18 in a two-county group consisting of New Hanover and Pender Counties. This also allowed grouping Columbus and Brunswick Counties, thereby creating two additional two-county groups in place of a four-county group. The number of county splits and county line traverses was also reduced in the 2003 Plan as the district now divides only two counties and has one traverse. The black population, though somewhat reduced, remains at 42.89% BPOP, 39.36%

BVAP, and 53.72% black registered Democrats, which past experience has shown is sufficient in North Carolina to provide an effective black voting district.

11. We found it was not possible to draw District 18 wholly within New Hanover County and to maintain an effective black voting district. If the district is drawn wholly within New Hanover, the BPOP drops below 36%, the BVAP below 32%, and black Democratic registration below 49%. To illustrate, see the two attached maps created drawing District 18 wholly within New Hanover County. One plan (Attachment C) splits no precincts, while the other plan (Attachment D) splits precincts to raise the black population percentages as high as possible. These percentages are below the levels that have in the past successfully provided black citizens in North Carolina an opportunity to elect their candidates of choice.

12. All of the statistics mentioned in this affidavit are available on the General Assembly's DistrictBuilder computer redistricting system.

13. In my discussions with the Legislative Black Caucus leadership and Representative Wright, it was clear that there were very strong feelings about the importance of maintaining District 18 as an effective black voting district. There was a serious concern about the possibility of a § 2 VRA challenge to the plan. Representative Wright, like every other

legislator, would have preferred to keep the configuration of his district at that time unchanged. He was concerned about the black voters in Brunswick and Columbus Counties who had supported him in all of his elections since 1992. Although no portion of Pender County was included in the court-drawn Interim Plan under which the 2002 elections were held, Representative Wright had represented a portion of Pender County (former District 98) from his first election in 1992 until the 2002 election. Representative Wright did vote for the 2003 Plan.

14. Based on the information available to me and other legislators, it was felt that we had an obligation to find a way to maintain an effective black voting district in the area in order to comply with the Voting Rights Act, but we also needed to adjust the district as much as possible to comply with the WCP requirements set out by the Court. As Co-Chair of the House Legislative Redistricting Committee, I think the 2003 Plan constitutes the best possible compromise between the requirements of the Voting Rights Act and the Court's instructions regarding the WCP in its *Stephenson* opinions.

This the 9 day of June, 2004.

/s/ Martha B. Alexander
Representative Martha B. Alexander

***Pender County v. Bartlett*, Wake County Superior Ct., No. 04 CVS 0696, Aff. of Rep. Martha B. Alexander, June 9, 2004**

Sworn to and subscribed before me this
9th day of June, 2004.

/s/Denise H. Mazza
Notary Public

My commission expires: 1-31-06

OPPOSITION BRIEF

86

(7)

No. 07-689

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IN THE

Supreme Court of the United States

GARY BARTLETT, *et al.*,
Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

CARL W. THURMAN III *
LAW OFFICES OF
CARL W. THURMAN III
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

* Counsel of Record

February 14, 2008

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IN THE

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BRIEF IN OPPOSITION

STATEMENT

Respondents will not restate the history and factual summary presented in the Petition. Several points do need clarification, however. It also is important to understand the background which resulted in the current litigation. Pender County is a fast growing coastal county, which experienced growth of 42.4% between 1990 and 2000 according to the United States decennial census. This was the sixth fastest rate of growth in the State of North Carolina. Until 2003, no Pender County resident had served in the North Carolina General Assembly since the provision permitting each county a representative was abolished in the 1960's. In the redistricting plan

proposed by the General Assembly in 2001, Pender County was to be split among 5 House and 3 Senate districts. This splintering of the County resulted in Pender County submitting an amicus brief in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*). The majority opinion in *Stephenson I* recognized the plight in which Pender County was placed by the "balkanization" of its citizens. As a result of the decision in *Stephenson* I, Pender County was kept whole in one House district and a Pender County resident was elected. The North Carolina Supreme Court subsequently clarified the redistricting standards to be used in a second decision involving the same parties. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2002) (*Stephenson II*). After the adoption of another redistricting plan in November 2003, additional litigation was pursued by the original *Stephenson* plaintiffs which resulted in a ruling that a new action had to be filed to challenge the 2003 plan and that the challenge must be heard before a three judge panel pursuant to a newly enacted statute. *Morgan v. Stephenson and Stephenson v. Bartlett*, 595 S.E.2d 112 (2004). Three weeks after that opinion, Respondents filed the present action.

The proceedings below were handled largely by stipulations entered into between the parties. The decision to proceed by way of stipulation was made by Respondents both to conserve costs and in the vain hope for a quick resolution (this action was commenced in 2004, but relief will not be achieved until 2010). Section 2 of the Voting Rights Act (42 U.S.C. Sec. 1973) formed no part of Respondents' case and was raised essentially as an affirmative defense by the petitioners. As the three Judge panel noted below, in the absence of the VRA claim, the contested

districts were "toast" under the Whole County provision of the North Carolina Constitution. Appendix, 92A. Among the many issues not addressed below was the distinction between the ability of the proposed influence district to elect a minority candidate of choice and the ability of the district to elect an incumbent minority candidate of choice.[1] Because relief was sought pursuant to the North Carolina Constitution for residents of a single County, there was no attempt to evaluate other North Carolina legislative districts, much less the VRA issue as argued by Petitioners and amici curiae.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Certiorari should not be granted in this case because the primary and controlling issue is one of North Carolina law, namely the application of the "whole county provision" of the North Carolina Constitution to legislative redistricting. Respondents in their complaint sought relief under the whole county provision. The VRA is involved in the litigation only because the Petitioners asserted that the mere possibility of an unasserted VRA claim justified their partially ignoring the whole county provision when drawing the districts at issue. At this stage, there can be no serious contention that a violation of Section 2 of the Voting Rights Act exists or needs to be remedied because the legislative districts, to be used

---

[1] This distinction may become germane because the incumbent presently is under six felony indictments and the North Carolina General Assembly is considering expelling him from the General Assembly. Robertson, Gary D., *Panel Upholds Wright Charges*, Raleigh News & Observer, February 12, 2008, B1 (http://www.newsobserver. com/1565/story/937224.html)

for the 2010 elections, have not yet been drawn. The districts ultimately drawn by the North Carolina General Assembly may create a true majority minority district in order to comply with the VRA. While the issues raised by the appeal may well be ones of interest, answering them at this point would consist of giving an advisory opinion.

The central issue raised by Petitioners is whether under *Thornburg v. Gingles*, 470 U.S. 30 (1986) and the VRA a majority minority district requires that the minority group comprise an actual majority of the population within the district. There is no support for the contention that a split on the 50% issue exists because all the Circuit Courts and highest State Courts which have dispositively ruled on the issue have adopted the 50% rule. The reason the rule has received universal acceptance by the Circuit Courts is that it complies with both the literal language of this Court in *Gingles* and the statutory language of Section 2 of the VRA. Finally, the 50% rule is workable and easily applied which will greatly limit the number of cases in which the judicial branch will be involved in the inherently political act of drawing electoral districts.

1. The Decision Below Is Controlled By The North Carolina Supreme Court's Interpretation Of The North Carolina Constitution Not Federal Law.

In seeking certiorari from this Court, the Petitioners ignore the central and controlling nature of the North Carolina Constitution in the decision below. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). The North Carolina Constitution provides that County lines are to be respected in draw-

ing legislative districts. N.C. Const. Art II, Sections 3 & 5. In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)(*Stephenson I*) the North Carolina Supreme Court first announced the criteria to be used in reconciling the WCP with the Voting Rights Act and one person one vote requirements.

The Court subsequently clarified its holding by reiterating its first decision and setting out nine redistricting factors to be used:

> After a lengthy analysis of these constitutional provisions and applicable federal law, we outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:
>
> [1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the

> at or within plus or minus five percent "one-person, one-vote" standard.
>
> [6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined*[.]
>
> [7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*
>
> [8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> [9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (emphasis added).

Stephenson II, at 305-307, 582 S.E.2d 247, 250-51. In applying the *Stephenson* factors for non-VRA counties, the key is to cluster counties in order to have appropriate population while dividing as few counties as possible. The North Carolina General Assembly here placed Pender County and New Hanover County into a two County cluster which had sufficient population to form three House districts. The North Carolina Supreme Court opinions recognize the supremacy of the VRA by directing that VRA districts are to be drawn first. Here, if the State were actually

attempting to create a required VRA district, then it should have drawn a majority minority district as the first priority, then looked to the lower priority issue of respecting County lines. The reason the VRA became involved in the case is that unless a Section 2 remedial district was required, the district at issue clearly violated the North Carolina Constitution. Under the North Carolina Supreme Court's decision in the current case, the General Assembly will have the opportunity to redraw districts which must first comply with the VRA. Given that the decision below hinged on an interpretation of the power of the North Carolina General Assembly to redistrict under the North Carolina Constitution, granting certiorari would be inappropriate.

2. There Is No Violation Of The VRA Because The Districts Have Not Yet Been Redrawn.

Certiorari is especially inappropriate in this case because there is no possible violation of the VRA at this point. The North Carolina Supreme Court has directed that new districts be drawn for use in the 2010 elections based upon the standards set forth in the *Stephenson* cases and the instant decision. Given that those lines have not been drawn, it is impossible to say whether any of the districts drawn will violate the VRA. The Court expressly left "to the General Assembly the decision whether House District 18 should be redrawn as a non-VRA district, or whether it should be redrawn to meet the numerical majority requirement to satisfy the first *Gingles* prong." *Pender County v. Bartlett*, 361 N.C. at 510. Accordingly, it is possible that a district would be drawn which produced an actual majority minority district. Drawing a minority majority district cannot constitute a viola-

tion of the VRA. *Johnson v. De Grandy* 512 U.S. 997, 1000 (1994). To grant certiorari at this stage would be to provide little more than an advisory opinion about a situation which does not yet, and may never, exist. The decision of the North Carolina Supreme Court simply does not provide a clean or clear case for addressing the proposed issue. The multiple amicus briefs make clear that they hope this Court will use this case to provide a roadmap for redistricting after the 2010 census. There are many issues on which many people would like this Court to clarify the law, but that is not the role of the Court. 28 U.S.C. Sec. 1257 (1998). To grant certiorari now would prevent North Carolina from having the opportunity to draw districts which comply with both Section 2 and the North Carolina Constitution.

3 No Actual Split In Authority Exists With Regard To The 50% Rule.

Despite Petitioners' best efforts to create an alleged conflict among Circuit Court opinions, none exists. Petitioners acknowledge that the Fourth, Fifth, Sixth and Seventh Circuits have adopted the 50% rule. Petition p. 13. Respondents would submit that the Tenth[2] and Eleventh[3] Circuits likewise have adopted the 50% rule. Regardless of quibbles with regard to the other Circuits, including the Ninth, it is clear that every Circuit Court which has adopted a clear position has adopted the 50% rule.

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[2] *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir.1996) (noting that "satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible"), *cert. denied sub nom.* Colorado v. Sanchez, 520 U.S. 1229 (1997).

[3] *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997).

Against the weight of this authority Petitioners submit an inconclusive opinion from the First Circuit and a decision of the New Jersey Supreme Court where the discussion of the VRA was mere dicta. In *Metts v. Murphy*, 363 F.3d 8 (2004)(en banc) the First Circuit refused to grant a motion to dismiss. "We are thus unwilling at the complaint stage to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent." *Id.* at 11. That the Court was not deciding the issue on the merits is clear from its direction as to further proceedings "Whether a full-scale trial is needed is an entirely different matter; perhaps summary judgment will suffice depending on how the evidence develops and the ultimate theory or theories offered by both sides-theories that hopefully will go beyond dueling claims as to what *Gingles* means." *Id.* at 12. Given that a 26% minority population could at best hope to be an influence district, the value of this opinion to the actual question presented seems remote.

Petitioners also attempt to rely on an opinion from the New Jersey Supreme Court as the basis for a split in authority. *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003), *cert. denied*, 540 U.S. 1107(2004) held in dicta that the bright line test was not to be followed. *McNeil* involved a challenge to the creation of three state senate districts in the Newark and Jersey City areas, instead of the two required by the New Jersey Constitution. The Court first determined that the one person one vote standard required a redistricting plan which disregarded the municipal boundary provision of the New Jersey constitution. The Court found three alternative and independent grounds upon which to invalidate the

provisions of the New Jersey Constitution (two of which were based in State law) before reaching Section 2. It also bears mentioning that unlike the North Carolina Supreme Court, the New Jersey Supreme Court determined to simply invalidate the county and city line restrictions imposed by the New Jersey constitution. There was no attempt to reconcile the provisions of the state constitution with federal requirements as was done in the *Stephenson* cases. Thus, the New Jersey Supreme Court reached the VRA issue only after resolving the actual dispute on two independent state grounds and a one person one vote analysis. In the petition for certiorari, the focus is on alleged differences between three judge panels in other jurisdictions having to nothing to do with this case or a split among the circuits. Pet. 18-21. There simply is no dispute among the Circuits about the 50% rule which this Court needs to resolve and until an actual split exists this Court should not take up the issue.

4. The Decision Below Complies Fully With The Decisions Of This Court And The VRA.

The decision by the North Carolina Supreme Court complies fully with the holdings of this Court and the VRA while also furthering the interest of limiting judicial involvement in redistricting. The VRA does not speak to a standard for drawing district lines, and despite the number of circuits which have adopted and currently follow the 50% rule, Congress has not amended Section 2 to indicate a contrary intent. The intent of the VRA also is supported because a contrary holding would not simply protect the right of minority group voters to participate in the political process, but rather would protect the right of minor-

ity group voters to form a coalition with some members of the majority group to elect a mutually acceptable candidate. This Court has established that Section 2 does not exempt a minority group from having to "pull, haul and trade" in the normal political process. *Degrandy*, 512 U.S. at 1020. To raise a coalition formed by a minority group to a special status does not ensure equal access, it grants a special status not provided for by the VRA. The purpose of the VRA is not to ensure that a minority group can elect its candidate, but rather to provide the minority group with an equal opportunity to that of other voters to elect a candidate of choice. *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993).

In addition to giving the Court's holding in *Gingles* appropriate respect by interpreting the word "majority" consistent with its ordinary meaning, following the 50% rule will reduce the opportunities for redistricting issues to require judicial resolution. Determining whether the 50% threshold is met is a straightforward determination not requiring speculation as to the motivation of voters. Absent a clear test, the judicial system will be drawn into increasingly difficult hair splitting involving sufficient populations to elect and conflicting claims between minority groups such as in *Metts* where the African American community complained that the increase in Latino population and a 5% decrease to 21% resulted in the election of a Latino instead of an African American candidate. *See also Hall v. Virginia*, 385 F.3d 421 (4th Cir., 2004), *pet. disc. rev. denied*, 125 S.Ct. 1725 (2005)(plaintiffs sought to increase African American population from 32% to 40% by redrawing the lines to take population from a 53% African American district). Competing interest groups will endlessy seek advantage and bring actions involving

increasingly thin margins if the Court abandons *Gingles*.

This case demonstrates the ease of application of the 50% rule. The remaining Plaintiffs in this case are individuals acting without the involvement or financial backing of political parties or interest groups. While petitioners and amici curiae decry the "mechanical" application of the first Gingles' factor, such an application provides the certainty they claim is needed prior to next round of redistricting. More importantly, it reduces the chance that the Courts will be drawn into the fights over the drawing of electoral districts. This Court recognizes, as does the North Carolina Supreme Court, that redistricting decisions are best left to the legislative branch. "The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams v. Johnson*, 521 U.S. 74, 101 (1997). The North Carolina Supreme Court likewise believes that redistricting should be left to the legislative branch and recognizes that the absence of a bright line rule will expose many more districts to challenge under the VRA.

> "Redistricting should be a legislative function for the General Assembly, not a legal process for the Courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that district must be configured in order to give it control over the election of candidates."

Bartlett at 505. As recognized unanimously by the Circuit Courts and the North Carolina Supreme Court, the 50% rule provides a bright line which can easily be applied by legislators and avoids continual litigation over district lines.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

CARL W. THURMAN III *
LAW OFFICES OF
CARL W. THURMAN III
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

* Counsel of Record

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REPLY BRIEF

84

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REPLY BRIEF FOR THE PETITIONERS

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.*
Grayson G. Kelley
Tiare B. Smiley
Alexander McC. Peters
Susan K. Nichols

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

February 2008 *Counsel of Record

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REPLY BRIEF FOR THE PETITIONERS

Contrary to Respondents' contentions in their brief in opposition, the certiorari petition demonstrates that the circuits and state courts of last resort are intractably split on an important issue of federal law – whether Section 2 of the Voting Rights Act protects a minority group from vote dilution if that group, as a result of limited but predictable crossover voting, has the ability to elect its candidate of choice in a proposed district but constitutes less than 50% of the district. This issue should be resolved by this Court before the next round of redistricting begins.

Following the decennial census in 2010, the boundary lines for thousands of Congressional, state and local election districts will need to be reformed. Unless this Court resolves the issue raised in this petition prior to 2010, many of those new boundary lines will be plagued by doubt (and inevitable litigation) as to whether the new districts comply with Section 2. The most efficient time to resolve such uncertainty is before redistricting occurs – not after thousands of new districts have been drawn.

It is unlikely that another case will present itself to this Court raising the issue set out in the petition prior to the next round of redistricting. For most States, redistricting occurs once every ten years – a process that commences shortly after the decennial census. Litigation concerning those districts is generally resolved within a few years of the creation of the districts. That cycle will commence again following the 2010 census. Here, the only reason that the issue is presented eight years after the last census is because North Carolina underwent mid-cycle redistricting as a result of decisions by the North Carolina Supreme Court.

The petition presents a unique opportunity for this Court to resolve an unsettled and important election law issue before districts are redrawn throughout the country. Respondents' arguments that this Court should deny review are unavailing.

I. RESPONDENTS' SUGGESTION THAT THE PETITION IS PREMATURE IS WITHOUT MERIT.

Respondents argue that because the decision of the North Carolina Supreme Court directs the North Carolina General Assembly to draw new district lines, the petition is premature. Respondents assert that because new district lines "have not yet been drawn" in accordance with the North Carolina Supreme Court's decision, any decision by this Court would be "an advisory opinion." (Br. in Opp. 4)

If this Court were to grant certiorari and reverse the North Carolina Supreme Court's interpretation of Section 2, the existing legislative districts would stand as valid and would therefore remain in place until the next census. The redistricting that has been ordered by the North Carolina Supreme Court prior to the next census is only needed because of the North Carolina Supreme Court's erroneous reading of Section 2 of the Voting Rights Act. The decision of the North Carolina Supreme Court has a real and direct impact upon Petitioners and the minority voters in House District 18.

Respondents' speculation, unsupported by the record, that perhaps a district could be drawn in this area of North Carolina with an African-American population of greater than 50% in no way diminishes the fact that the final judgment at issue directs the

North Carolina General Assembly to abandon current districts and begin redistricting anew. The new districts must be drawn according to the North Carolina Supreme Court's erroneous interpretation of the Voting Rights Act. House District 18, with its proven record of electing the candidate of choice of a minority group, will no longer exist.[1]

Congress has given this Court the authority to review final judgments "rendered by the highest Court of a State" which involve an issue of federal law. 28 U.S.C. § 1257(a) (2000). Here, the North Carolina Supreme Court's decision directs the North Carolina General Assembly to redraw legislative districts. That decision constitutes "the final word" by the highest state court. *Mkt. St. R.R. v. R.R. Comm'n,* 324 U.S. 548, 551 (1945). Accordingly, it is reviewable by this Court.

---

[1] Other districts are also at risk. On Nov. 20, 2007, a separate action was filed in federal court to compel redistricting beyond Pender and New Hanover Counties. *Dean v. Leake,* No. 2:07-CV-51-FL (E.D.N.C.). In *Dean,* plaintiffs attack, on equal protection grounds, several other districts that have repeatedly elected African-American candidates to the North Carolina General Assembly. These districts also contain less than a mathematical majority of African-Americans. Relying on the decision below, plaintiffs argue that because these districts were designed to contain a specific minority percentage, but failed to meet the 50% threshold, race was impermissibly used in drawing these districts without a compelling state interest, such as compliance with the Voting Rights Act.

II. THE SOLE LEGAL ISSUE BEFORE THE NORTH CAROLINA SUPREME COURT WAS THE CONSTRUCTION AND APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

Respondent contends that certiorari should not be granted "because the primary and controlling issue is one of North Carolina law." (Br. in Opp. 3) The decision below, however, rested solely and exclusively on the interpretation of Section 2 of the Voting Rights Act.

Before the three-judge panel, the State asserted that the manner in which House District 18 was drawn (*i.e.*, dividing county lines) was compelled by federal law, specifically, Section 2 of the Voting Rights Act. (Pet. App. 53a) As Respondents themselves argued in their motion for summary judgment: "the only contested legal issue appears to be whether Section 2 of the Voting Rights Act (42 U.S.C. 1973) requires that Pender County be split." (Pet. App. 73a) Both the three-judge panel and the North Carolina Supreme Court recognized that the issue before it was the meaning and construction of Section 2 of the Voting Rights Act. (Pet. App. 2a, 72a)

The North Carolina Supreme Court clearly rested its decision on its construction of federal law. Thus, this Court has jurisdiction to take the petition. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2522 (2006); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006).

III. THE CIRCUIT COURTS AND STATE COURTS OF LAST RESORT ARE INTRACTABLY SPLIT ON THIS ISSUE.

Respondents contend that this Court should not grant certiorari because there is no circuit conflict. (Br. in Opp. 9-11) Respondents' argument that there is no circuit conflict is incorrect.

Respondents assert that the decision of the First Circuit in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) does not stand as a true conflict with the decisions of other circuits. (Br. in Opp. 10) In *Metts*, the district court granted a motion to dismiss plaintiffs' vote dilution claim under Section 2 because the plaintiffs could not show that the minority population would exceed 50% of the proposed district. The First Circuit in an en banc decision reversed the district court, concluding that plaintiffs' complaint stated a claim upon which relief could be granted. The First Circuit had to reject the 50% rule, as the language of its opinion indicates, in order to reverse the dismissal of the complaint under Rule 12(b)(6) of the Rules of Civil Procedure.

Respondents also attempt to minimize the split of authority by characterizing the decision of the New Jersey Supreme Court in *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003), as dicta. (Br. in Opp. 10-11). In *McNeil*, the New Jersey Supreme Court expressly recognized that a vote dilution claim may be brought under Section 2 to create a coalition district in which the minority population is less than 50% of the proposed district. *Id.* at 851-54. The New Jersey Supreme Court recognized that its decision was also compelled by the one-person, one-vote doctrine. The fact that the New

Jersey Supreme Court set out alternative bases for its decision does not render either alternative holding as dicta. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948). The 50% rule was expressly considered and rejected by the New Jersey Supreme Court. Unquestionably, the *McNeil* decision is binding on the New Jersey General Assembly with respect to the drawing of district lines.[2]

This Court should reject Respondents' assertion that the circuit split can be ignored because a greater number of circuits have resolved this issue in favor of Respondents than in favor of Petitioners. Respondents overlook the numerous three-judge panels that have held that Section 2 protects coalition districts. *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320-22 & n.56 (S.D. Fla. 2002) (three-judge court); *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court); *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge court); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court). The legislatures in these States cannot simply ignore such precedent in drawing districts. Accordingly, these decisions alone ensure that state legislatures will not

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[2] Additionally, Respondents cite to *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), and assert that this decision reflects that the Tenth Circuit has also adopted the 50% rule. (Br. in Opp. 9) The *Sanchez* decision, however, neither supports nor rejects the 50% rule. The plaintiffs in *Sanchez* successfully challenged a district that was less than half Hispanic by proposing an alternative district that was more than half Hispanic. The Tenth Circuit's holding is simply irrelevant to the question presented in the instant case.

be consistent in their application of the Voting Rights Act.

Respondents also ignore the position of the United States Department of Justice on this issue. The Department of Justice has repeatedly urged this Court to reject an interpretation of Section 2 that imposes a literal, numerical requirement of 50%. (*See* Amicus Br. of the League of Women Voters of the United States 8-11 (citing numerous amicus briefs filed by the United States))

More importantly, this Court has repeatedly assumed that a vote dilution claim may proceed even if the proposed district does not meet a 50% numerical threshold. *See, e.g., League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2624 (2006) (plurality opinion). Three justices of this Court have expressly rejected the 50% rule. *Id.* at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part). A clear split exists within federal and state courts with respect to this issue. This Court would not benefit by further percolation of the issue among the lower courts. In fact, failure to resolve this issue prior to the next round of redistricting will harm state and local governments, candidates for office, minority voters and our nation as a whole.

IV. THE NORTH CAROLINA SUPREME COURT ERRED IN ITS CONSTRUCTION OF SECTION 2 OF THE VOTING RIGHTS ACT.

The decision of the North Carolina Supreme Court is not consistent with the language of the Voting Rights Act or Congressional intent. Respondents' argument to the contrary is incorrect.

Respondents argue that Congress is undoubtedly aware that numerous circuit courts have adopted the 50% rule. (Br. in Opp. 11) Respondents assert that Congress' failure to override these circuit court decisions reflects Congressional intent to embrace such a rule. This Court, however, has repeatedly noted that Congressional inaction is a poor indication of Congressional intent. *See, e.g., Kimbrough v. United States,* 128 S. Ct. 558, 573 (2007); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). Moreover, Respondents' theory of Congressional acquiesce is belied by this Court's repeated indications that a Section 2 claim may be brought even in the absence of a 50% numerical majority. *See, e.g., LULAC,* 126 S. Ct. at 2624 (plurality opinion). Given this Court's statements indicating that such a Section 2 claim may be brought, Congress simply has had no reason to adopt legislation reiterating that this Court's assumptions are correct.

Respondents further assert that the 50% rule provides a clear test that avoids "difficult hair splitting." (Br. in Opp. 12) In making this argument, Respondents rely on examples of plaintiffs bringing Section 2 claims to establish influence districts, *i.e.*, districts in which the minority population is not sufficiently large to elect a candidate of choice but is

large enough to influence the outcome of close elections. Respondents gloss over the fact that the present case does not concern an influence district. Rather, what is at stake is whether a Section 2 claim may be brought with respect to a district in which the minority group has a proven ability to elect a candidate of choice based on limited yet predictable crossover voting from another racial group (*i.e.*, a coalition district). This case is not about influence districts.

Respondents further emphasize that the 50% rule will facilitate "ease of application." (Br. in Opp. 13) The Voting Rights Act, however, has never been about ease of application. The purpose of the Act is to ensure that minority voters are treated fairly and equitably, regardless of whether the protections of the Act are inconvenient. "Ease of application" is simply not sufficient justification to ignore Congress' mandate that district lines are to be reviewed "based on the totality of circumstances" to ensure that a protected group is not afforded "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The intent of Section 2 of the Voting Rights Act is to address historic and continuing patterns of racial discrimination that have the effect of denying racial minorities an equal opportunity to elect their candidates of choice. Nothing in the Act itself or its history supports the view that Section 2's remedial effects should be narrowly limited to minorities only when they can be drawn into districts where they have a mathematical majority.

As three justices of this Court have correctly observed, the 50% rule is not supported by the

language of the Act or by Congressional intent. *LULAC*, 126 S. Ct. at 2645 n.16 (Stevens, J., concurring in part and dissenting in part); *id.* at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part). The decision of the North Carolina Supreme Court should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

Grayson G. Kelley
Chief Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

Alexander McC. Peters
Special Deputy Attorney General

Susan K. Nichols
Special Deputy Attorney General

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*Counsel of Record

AMICUS CURIAE BRIEF

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No. 07-689

In the Supreme Court of the United States

GARY BARTLETT, ET AL., PETITIONERS,

v.

DWIGHT STRICKLAND, ET AL., RESPONDENTS.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR THE STATES OF ILLINOIS, LOUISIANA, MARYLAND, AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

[additional counsel listed on signature page]

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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INTEREST OF THE *AMICI CURIAE*[1]

This case asks whether a minority group must constitute a numerical majority in a single-member district to state a claim under § 2 of the Voting Rights Act ("Act"), or whether it is sufficient that the minority group—although comprising less than 50% of the population—is effectively the majority because it has a realistic opportunity to elect its preferred candidates as a result of reliable white crossover voting.

Amici States have a critical interest in this matter. Every ten years, based on the results of the dicennial census, state and local legislatures redraw district lines to comply with the Constitution's "one person, one vote" principle and § 2's prohibition against vote dilution. Any uncertainty in the law on which these redistricting decisions are based inevitably engenders time-consuming and costly litigation and, worse still, requires judicial intervention if a legislative solution is not obtainable—thereby removing to the judicial branch a distinctly legislative function.

The current discord surrounding the so-called "50% rule" is no exception. White crossover voting is common, and, as a result, whether § 2 permits, or even requires, crossover districts has a significant impact on how legislatures draw district lines. For this reason, the uncertainty surrounding the 50% rule caused substantial litigation during the redistricting following

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[1] Pursuant to Rule 37.2(a), the *amici curiae* mailed notice of their intention to file this brief to counsel of record at least 10 days prior to the due date of the brief.

the 1990 and 2000 census. Given the high stakes and the continued lack of consensus surrounding the rule, the same result is sure to obtain if this dispute is not resolved prior to the next round of redistricting. For this reason, regardless of how the Court resolves the question presented, *amici* States have a strong interest in obtaining the certainty that resolution will provide.

STATEMENT

1. Members of the North Carolina House of Representatives ("House") are elected from single-member districts and serve two-year terms. Pet. App. 58a. In 1982, using the results of the 1980 census, the North Carolina General Assembly ("General Assembly") enacted a redistricting plan that divided Pender County between two districts. *Id.* at 60a-61a. This plan was in effect for all House elections from 1982 through 1990. *Id.* at 60a.

2. In 1992, the General Assembly undertook redistricting based on the results of the 1990 census. The resulting plan, which was in effect from 1992 through 2000, divided Pender County among three districts. Pet. App. 61a. One of the districts (District 98) was drawn on the insistence of the United States Department of Justice ("USDOJ") that minority voting strength was not being sufficiently recognized in southeastern North Carolina. *Id.* at 64a-65a.[2]

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[2] North Carolina must submit its redistricting plans to the USDOJ for approval because 40 of its counties are subject to the federal "preclearance" requirement in § 5 of the Act. Pet. App. 63a; see also *infra* p. 18.

3. At the time of the 1990 census, District 98 had an African-American population of 59.26% and an African-American voting age population of 55.72%. Pet. App. 61a. By the 2000 census, however, these figures had declined to 50.70% and 47.07%, respectively. *Ibid.* At the same time, 62.53% of the district's registered voters were Democrats, 53.37% of whom were African-American. *Ibid.* Because Democrats constituted a majority of registered voters and African-Americans constituted a majority of Democrats, the candidate preferred by African-American voters had the best chance of winning the House seat in District 98—by prevailing in the Democratic primary and then, as a result of crossover votes from white Democrats, by winning the general election. *Id.* at 61a-62a. Indeed, Representative Thomas Wright, an African-American and a Democrat, was elected to represent District 98 from 1992 through 2000. *Id.* at 61a.

4. Using the results of the 2000 census, the General Assembly again undertook redistricting, resulting in the "2003 plan," which divided Pender County between two districts, District 16 and District 18. Pet. App. 69a.[3] District 18, home to Representative Wright, has an African-American population of 42.89% and an African-American voting age population of

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[3] Because the General Assembly's initial redistricting plan failed to garner judicial approval, the 2002 elections were held pursuant to a judicially crafted interim plan. Pet. App. 60a. Representative Wright was elected to represent interim District 18, which had an African-American population of 46.99% and an African-American voting age population of 43.44% but a Democratic population of 64.31% (of registered voters), 52.58% of whom were African-American. *Id.* at 68a.

39.36% but a Democratic population of 59.01% (of registered voters), 53.72% of whom are African-American. *Id.* at 69a-70a. In the 2004 elections, Representative Wright won re-election. *Id.* at 60a.

5. In 2004, respondents brought this lawsuit, alleging that the division of Pender County into two districts violated the "Whole County Provisions" ("WCP") of the North Carolina Constitution, Pet. App. 6a, which provide that "[n]o county shall be divided" in the formation of legislative districts, N.C. Const. art. II §§ 3(3), 5(3). Previously, the North Carolina Supreme Court had applied the WCP to hold that county lines may be cut to comply with federal law, so long as they are divided no more than that law requires. Pet. App. 3a. In the current litigation, a three-judge panel of North Carolina's Superior Court unanimously rejected respondents' claims, holding that § 2 of the Act mandated District 18 and that the WCP therefore did not preclude the division of Pender County. Pet. App. 116a-117a.

6. The panel acknowledged that the General Assembly drew District 18 as a "preemptive strike" against the likelihood that, if an effective minority district was not maintained in southeastern North Carolina, a lawsuit would allege impermissible vote dilution. Pet. App. 90a. Indeed, without dividing Pender County, the maximum African-American population achievable within a single district was less than 36%, the maximum African-American voting age population less than 32%, and the maximum African-American Democratic population less than 49%—not enough to ensure that African-American voters had a

realistic opportunity to elect their preferred candidate. *Id.* at 138a.

7. The panel then addressed the three preconditions to a § 2 claim set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986)—that (1) the minority group is "'sufficiently large and geographically compact to constitute a majority in a single member district,'" (2) the minority group is "'politically cohesive,'" and (3) "'the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate.'" Pet. App. 77a (quoting *Gingles*, 478 U.S. at 50-51). Focusing on the first precondition, the panel rejected respondents' proposed, "bright-line" rule, which would require a minority group to form an absolute numerical majority to state a § 2 claim. Pet. App. 90a-91a, 93a. Instead,"as a matter of practical common sense," the court held that the "inquiry must focus on the *potential of black voters to elect representatives of their own choosing* not merely on sheer numbers alone." *Id.* at 93a (emphasis in original). Thus, satisfaction of the first *Gingles* precondition depends on "whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a *de facto* majority that can elect candidates of their own choosing." *Ibid.*

8. Applying this approach, the panel concluded that African-Americans did constitute a *de facto* majority in District 18. Pet. App. 97a-99a. As the panel explained, "[i]n North Carolina, a *more important indicator of*

effective black voting strength [than sheer numbers of African-Americans, or African-Americans of voting age] *is the percentage of registered Democrats who are black.*" *Id.* at 97a (emphasis in original). Specifically, the court determined that districts with an African-American voting-age population of 37.81% or greater—like District 18—will provide an effective opportunity for the election of candidates preferred by African-American voters. *Ibid.* Based on these findings, the panel concluded that District 18 satisfied the first two *Gingles* preconditions as a matter of law. *Id.* at 99a-100a. Then, after the parties stipulated to the satisfaction of the third *Gingles* precondition, the panel granted summary judgment for petitioners on its finding that, based on the totality of the circumstances, the creation of District 18 was required by § 2. *Id.* at 112a-113a, 115a-116a.

9. In a divided opinion, the North Carolina Supreme Court reversed. Although the majority recognized that, as a result of reliable support from white voters, African-Americans in District 18 had the effective ability to elect their preferred candidate, Pet. App. 5a, the court nevertheless held that § 2 did not require District 18 because African-Americans did not comprise 50% of the district's eligible voters, *id.* at 19a-22a. In reaching this conclusion, the majority reasoned that *Gingles* requires an actual numerical majority, and that such a rule would be "logical" and "readily applicable in practice." *Id.* at 19a-20a.

10. By contrast, the dissenting justices relied on the language of § 2—specifically, its requirement that courts consider "the totality of the circumstances." 42 U.S.C.

§ 1973. According to the dissent, this language favors a "flexible standard based on political realities" rather than a literal numerical majority. Pet. App. 48a. The dissent also noted that this Court had "repeatedly declined to close the door" to § 2 relief under the circumstances of this case and, moreover, "caution[ed] lower courts against applying *Gingles* to impose a rigid numerical majority requirement." *Id.* at 41a-42a. Finally, the dissent questioned the majority's view that a strict, 50% rule was necessary for administrative ease. Past election results in North Carolina demonstrate that African-American Democratic voter registration is "the most relevant indicator of black voting strength," and, indeed, "districts where such registration exceeds fifty percent consistently elect black representatives." *Id.* at 46a. Justice Timmons-Goodson wrote separately to note the majority's "insufficient deference to the legislature's considered judgment." *Id.* at 50a.

REASONS FOR GRANTING THE WRIT

As election results from the past two decades demonstrate, minority voters are routinely able to elect their preferred candidates from districts in which they constitute less than a numerical majority. Thus, the question whether federal law permits, or requires, "crossover districts" is of paramount importance to state and local authorities. As North Carolina's certiorari petition explains, however, courts have been unable to reach agreement on this difficult question. And as members of this Court recently observed, "the day has come to answer it." *League of United Latin American Cities ("LULAC") v. Perry*, 126 S. Ct. 2594, 2648 (2006) (Souter, J., joined by Ginsburg, J.,

concurring in part and dissenting in part). This case provides an ideal vehicle for doing so.

The North Carolina Supreme Court adopted a numerical majority requirement that has become the more prevalent approach, but the question is the subject of a mature split among state and federal courts. And while this Court has thus far declined to address the propriety of the 50% rule, at least three of its members have rejected it outright. This absence of conclusive authority has left States and other redistricting bodies without essential guidance in their efforts to comply with § 2, resulting in lengthy and expensive redistricting proceedings and inevitable litigation.

Significantly, this case may present the final opportunity for the Court to resolve this important question prior to the 2010 census. Accordingly, the Court should grant the petition for certiorari and thereby allow the next round of redistricting to proceed unencumbered by the costs and delays engendered by ongoing uncertainty over the 50% rule.

I. THIS COURT HAS DELIBERATELY LEFT OPEN THE QUESTION PRESENTED BY THIS APPEAL.

As the North Carolina Supreme Court acknowledged, this Court repeatedly has confronted the question presented here—whether a minority group may obtain § 2 relief even though it does not constitute a numerical majority in a single-member district—and, on each occasion, has reserved judgment. Pet. App. 14a-15a; see also *id.* at 39a-43a (Parker, C.J., dissenting). In *Gingles* itself, the Court expressly declined to address

"whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12. Notably, four members of the Court would have held that § 2 may afford relief under such circumstances, based on the view that if a minority group

> can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. at 89 n.1 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment).

Since *Gingles*, the Court has continued to face claims that § 2's protections are not limited to "majority-minority" districts, and has left the door open to such claims. See, *e.g.*, *LULAC*, 126 S. Ct. at 2624 (assuming without deciding that minority group may satisfy initial *Gingles* prong if its members "constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes") (citation and internal quotations omitted) (Kennedy, J., writing for the plurality); *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994) ("assum[ing] without deciding that even if Hispanics are not an absolute majority of the relevant

population in the additional districts, the first *Gingles* condition has been satisfied in these cases"); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming without deciding that § 2 claim may be based on allegations "not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original).

Recently, however, the question has assumed a growing urgency. In *LULAC*, Justice Souter, joined by Justice Ginsburg, called upon the Court to reach the issue, explaining that although in the past the Court had "sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, * * * the day has come to answer it." 126 S. Ct. at 2647-48 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part). Justice Souter went on to write that a minority group might satisfy the first *Gingles* precondition in ways other than by showing that it constitutes more than 50% of the population, such as by demonstrating that its members "constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win the general election." *Id.* at 2648. And Justice Stevens, writing separately, "agree[d] with Justice Souter that the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry." *Id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part).

Moreover, while the Court's prior cases implicating the 50% rule were amenable to resolution on other grounds, this case presents no such possibility. In light of the parties' stipulations, the case turns solely on the "narrow question [of] * * * whether th[e first *Gingles*] precondition * * * requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." Pet. App. 14a. Thus, this case presents the ideal vehicle for addressing a question that this Court has deliberately left open and that several of its members have recently urged should be resolved.

II. THE VIABILITY OF THE 50% RULE PRESENTS A QUESTION OF SIGNIFICANT PRACTICAL IMPORTANCE.

It is no accident that the question presented here has arisen many times in this and other courts. The viability of the 50% rule is an issue of critical practical importance because, as election results of the past two decades demonstrate, a minority group need not constitute 50% of a district to have a realistic chance to elect its preferred candidate.

"[T]he most current social-scientific data" indicate that "black candidates can be elected to office, despite the presence of significantly polarized voting patterns, in at least some districts * * * where the black voting-age population is 33% to 39% * * *." Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science & Voting Rights in the 2000's*, 80 N.C. L. Rev. 1517, 1537-38 (2002); accord Sam Hirsch, *Unpacking* Page v. Bartels: *A Fresh Redistricting Paradigm*

Emerges in New Jersey, 1 Election L.J. 7, 12 (2002) (after 2000, most African-American and Hispanic members of the New Jersey Legislature were elected from districts that are not majority-minority, and some were elected from districts that are less than 30% minority); Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework & Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397-98 (2001) (during the 1990s, African-American congressional candidates in Florida, Georgia, North Carolina, Texas, and Virginia prevailed in districts that were not majority African-American); J. Morgan Kousser, *Beyond* Gingles*: Influence Districts & the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-68 (1993) (in 1990, African-Americans and Hispanics elected to state and national office from California were elected from districts that were not majority-minority and in some cases were less than 34% minority).

That minority-preferred candidates are routinely elected from districts in which minority voters fall short of a numerical majority reflects the fact that minority electoral success is a function of more than raw population percentages. Election results also hinge, for example, on

> the relative weight at which minorities and whites participate in the electoral process, the degree to which minority and white voters support minority-preferred candidates, and the fact that the United States has a multi-stage electoral process that includes a primary election, a general

> election, and sometimes a run-off election as well.

Grofman, Handley, & Lublin, *supra*, at 1403-04; accord Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 18 (1993).

Minority electoral success also depends largely on the cohesiveness of majority and minority group voters. This is because "[a]s minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa." Kousser, *supra*, at 563; accord Lichtman & Herbert, *supra*, at 10-11. Thus, where minority voters are highly cohesive and white voters are not, minority groups may be able to elect their preferred candidates with less than 50% of the population.[4] This is especially so in districts where minority voters command a majority of the dominant political party, thereby enabling the minority-preferred candidate to prevail in the primary and then, if enough white voters cross racial lines to vote according to party affiliation, in the general election. In fact, studies of voting patterns since 1990 indicate that

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[4] The impact of minority- and majority-group cohesiveness on election results is illustrated by the following examples, which assume (for simplicity's sake) that the electorate is divided between two groups, the "majority" and the "minority." If the majority votes wholly as a bloc (that is, is 100% cohesive), the minority must constitute at least 50% of the population and be 100% cohesive to elect its preferred candidate. See Kousser, *supra*, at 563. However, if the majority is only 60% cohesive, the minority need constitute only 30% of the population and be only 90% cohesive for the minority-preferred candidate to prevail. See *ibid.*

minority voters do tend to vote highly cohesively, and that a reliable bloc of white voters—as much as one-third of the white population—are voting consistently on the basis of party affiliation, rather than race, in general elections. See, *e.g.*, Pildes, *supra*, at 1529-35.

Accordingly, the question presented in this case is of tremendous practical importance. It is essential for legislatures nationwide to know whether they must take into account cohesiveness and crossover voting in applying § 2 of the Act, or whether that provision applies only to districts in which minority voters form a numerical majority. Consider a recent example from Illinois. During redistricting following the 2000 census, the Illinois General Assembly enacted a plan designed to offer African-American voters a realistic opportunity to elect their preferred candidates in 19 districts. In one of these districts (District 78), however, African-Americans made up only 39% of the voting-age population. But as state planners anticipated, African-Americans have been able to elect their preferred candidate from District 78, for African-Americans constitute a majority of Democratic voters in that highly Democratic district. Under one view of § 2, federal law may shield districts like this one from minority vote dilution in future redistricting efforts; under the competing view (adopted expressly by the North Carolina Supreme Court), it would not. Knowing which is the proper interpretation of federal law is essential to the future work of the Illinois General Assembly, and its counterparts nationwide.

III. This Court's Intervention Is Needed To Resolve This Important Question Definitively.

The question whether a minority group must constitute 50% of the relevant population to state a claim under § 2 thus presents a question of significant practical importance for state and local redistricting efforts, and, as the certiorari petition demonstrates, courts have been unable to reach a consensus on this issue. See Pet. 12-21. Moreover, although the North Carolina Supreme Court followed what has become the more common approach, there is a mature split among state and federal courts on this question. Pet. Br. 12-21. Three members of this Court have indicated that they would resolve the question differently than the North Carolina Supreme Court did, see *supra* p. 10, and the issue does not lend itself to easy answers. Accordingly, absent this Court's intervention, the uncertainty surrounding the 50% rule is certain to persist.

Like the North Carolina Supreme Court, courts that read § 2 to require an absolute numerical majority rely heavily on one phrase from *Gingles*, specifically, the requirement that § 2 plaintiffs demonstrate that their minority group "'is sufficiently large and geographically compact to constitute a *majority* in a single-member district.'" Pet. App. 19a (quoting *Gingles*, 478 U.S. at 50, and adding emphasis). But § 2 requires courts to consider "the totality of the circumstances," and to determine whether "the political processes leading to nomination or election" provide minority voters with equal opportunity both "to participate in the political process and to elect representatives of their choice." 42

U.S.C. § 1973(b). As the dissenting justices in the North Carolina Supreme Court noted, this statutory language appears to counsel against a rigid numerical majority requirement. Pet. App. 48a.

Indeed, although courts rely on the quoted language from *Gingles* to support a 50% rule, *Gingles* made clear that it was leaving open the question. See *supra* pp. 9-10. Moreover, *Gingles* admonished lower courts to engage in "an intensely local appraisal" and a "searching practical evaluation of the past and present reality," as they undertake a "functional" analysis of vote dilution claims. 478 U.S. at 62, 78-79 (internal punctuation and citations omitted). Thus, *Gingles* itself may be understood to provide that minorities' actual ability to elect their preferred candidates, and not any numerical threshold, is determinative of the § 2 inquiry.[5]

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[5] The North Carolina Supreme Court also believed that its interpretation of the first *Gingles* precondition was compelled by the language of the third precondition—that is, the required showing that the majority votes "'sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate'"—which the majority described as in "tension" with any recognition of protected status for crossover districts. Pet. App. 25a-26a (quoting *Gingles*, 478 U.S. at 51). But because the criteria for crossover districts "may not be the same" as the criteria for the majority-minority districts at issue in *Gingles*, *LULAC*, 126 S. Ct. at 2651 n.8 (Souter, J., joined by Ginsburg, J.), not even the third precondition necessitates a 50% rule. And, in any event, *Gingles* itself specifically considered crossover voting and found prong three satisfied as long as "a white block vote * * * normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56.

The North Carolina Supreme Court also was of the view that the 50% rule is "more logical and more readily applicable in practice." Pet. App. 19a-20a. As for the former, the court explained that "[w]hen a minority group lacks a numerical majority in a district, the ability to elect candidates of their own choice was never within the minority group's grasp." *Id.* at 22a (internal punctuation and citation omitted). But, as we have explained, see *supra* pp. 11-12, this is demonstrably false; minority groups routinely elect their preferred candidates from districts that are less than 50% minority. As to the court's latter point, its concern about obtaining a workable standard for vote-dilution claims is legitimate. It is not obvious, however, that adoption of a 50% rule is the only way to achieve this goal.

Indeed, members of this Court have proposed an alternate, equally "clear-edged" rule: a requirement "that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party." *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J.). This limiting principle flows from the settled proposition that "a dominant party's primary can determine the representative ultimately elected." *Id.* at 2649; see also *supra* pp. 13-14. Other limiting principles may be available as well. See *LULAC*, 126 S. Ct. at 2648 n.3 (Souter, J., joined by Ginsburg, J.) (declining to "rule out other circumstances in which a coalition district might be required by § 2"). For example, courts concerned about "marginal," Pet. App. 24a, vote dilution claims might ask whether the number of majority-minority districts in combination with any

crossover districts meets the "rough proportionality" standard this Court has identified as an indicator of § 2 compliance, *Johnson*, 512 U.S. at 1023; see also Note, *The Implications of Coalitional & Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2609-10 (2004).

The North Carolina Supreme Court also failed to consider *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which members of this Court have called "[c]hief among the reasons" the Court's review of the 50% rule is warranted. *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J.). *Ashcroft* addressed § 5 of the Act, which requires jurisdictions with a history of racially discriminatory voting practices to preclear redistricting plans with the Department of Justice (or the federal district court in Washington, D.C.). Pet. App. 123a-25a. Proposed changes will receive federal preclearance only if they will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In *Ashcroft*, this Court observed that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts," and, accordingly, held that there is no impermissible retrogression under § 5 if a jurisdiction recasts a majority-minority district as a crossover district. 539 U.S. at 482-83. This determination that the 50% rule is inapplicable in the § 5 inquiry raises the question whether the rule should be rejected in the § 2 context as well. See *LULAC*, 126 S. Ct. at 2648.

In sum, the rationale for the 50% rule advanced by the North Carolina Supreme Court—which echoes the rationale employed by other courts that have adopted such a rule—is incomplete, controversial, and has been rejected by several members of this Court. No redistricting State may feel secure that its law on this issue—whether favoring a 50% rule or not—will survive scrutiny; and in those States where the courts have not yet reached this issue, legislators cannot feel confident in their ability to discern the correct result. This Court's intervention is needed to provide a definitive resolution to this difficult question.

IV. This Case May Be The Court's Final Opportunity To Address The Validity Of The 50% Rule Prior To The Next Round Of Redistricting.

We have explained that although there is no doubt that minority voters are routinely able to elect their preferred candidates from districts in which they constitute less than 50% of the relevant population, there nevertheless exists considerable doubt about whether States are required, or even permitted, to draw crossover districts. This conflicting authority has left States and other redistricting bodies without sufficient guidance as they attempt to comply with § 2, leading to costly and time-consuming redistricting proceedings and possible litigation. Indeed, the uncertainty surrounding the 50% rule is particularly problematic in States, like North Carolina, with provisions restricting legislative flexibility when redistricting. In such States, the legislature may be caught in a Catch-22: by drawing a crossover district, the State risks violating state law; but

by declining to create such a district, the State may run afoul of § 2. This Court need look no further than the lower court cases described in the certiorari petition, as well as the protracted proceedings in this case, for evidence that the current uncertainty regarding the 50% rule invariably results in a drain of scarce legislative and judicial resources.

Moreover, claims implicating the 50% rule have arisen more frequently in recent years, and this trend is likely to continue, as minority voting strength is increasingly—though not exclusively—a function of the ability to form effective coalitions with other groups. See, *e.g.*, Pildes, *supra*, at 1529. Because of the uncertainty surrounding the 50% rule, however, legislative bodies cannot be sure about their obligations to form crossover districts when redistricting.

Absent review by this Court, this uncertainty will continue unabated, while claims implicating the 50% rule will likely abound. As the certiorari petition points out, the decennial census will next occur in 2010, and States and other legislative bodies will undertake redistricting shortly thereafter. See Pet. 25-26. This case thus may present the Court with its final opportunity to resolve this significant issue before the next round of redistricting. Without the Court's intervention, the methods used to draw district lines in jurisdictions that follow the 50% rule will differ from the methods used in jurisdictions that do not. Moreover, legislatures in the remaining jurisdictions will be forced to guess which side of the split their courts will ultimately adopt. And should the Court resolve the issue after 2010 but before 2020, district

lines will have to be redrawn in all States that fall on the wrong side of the Court's newly-announced rule.

Thus, the question presented is ripe for this Court's review. The concurring Justices in *LULAC* stated as much. See *supra* p. 10. Moreover, because the propriety of the 50% rule was unsettled during both the 1990 and 2000 decennial redistrictings, the issue has had ample opportunity to percolate in numerous courts at all levels, see Pet. 12-21, and it has been thoroughly addressed in the academic commentary, see, *e.g.*, Luke P. McLoughlin, Note, Gingles *in Limbo: Coalitional Districts, Party Primaries & Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 312-49 (2005); Note, *supra*, at 2604-11; Pildes, *supra*, at 1539-67; J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 437-38 (2000); Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. Chi. Legal F. 389, 398-406.

Finally, regardless of the Court's ultimate holding on the merits, States and other redistricting bodies will gain from resolution of the uncertainty that currently surrounds the 50% rule. Whether the Court endorses or rejects the rule, legislatures will benefit, because they will no longer have to consider what federal law requires in terms of crossover districts, and will no longer have to litigate their ultimate resolution of this question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

December 2007

CHARLES C. FOTI, JR.
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MARC DANN
Attorney General
State of Ohio
30 E. Broad Street
17th Floor
Columbus, OH 43215

AMICUS CURIAE BRIEF

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No. 07-689

IN THE
Supreme Court of the United States

GARY BARTLETT, *et al.*,
Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, N.W., # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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MOTION FOR LEAVE TO FILE A BRIEF FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the League of Women Voters of the United States respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. Counsel of record for all parties received notice of the League's intention to file this brief more than ten days before the brief's December 26, 2007 due date.

Petitioners' counsel granted consent, but respondents' counsel withheld consent on the ground that he had been unable to speak with one of his clients.

The League's interest in this case arises from its long-standing involvement in reapportionment and redistricting, dating back more than half a century. The League, its members, and its affiliates in all 50 States and more than 850 local communities have been directly involved both in the debates over new districting maps after each decennial census and in the ongoing effort to reform the redistricting process itself.

The brief the League seeks to file will bring to the Court's attention relevant matter not already contained in the petition for a writ of certiorari, including (1) a thorough, historical description of the genesis of the current confusion surrounding coalition-district claims under Section 2 of the Voting Rights Act; (2) a detailed recounting of eight lower-court cases (six of which were not even cited by the court below) that declined to adopt the absolute "50% Rule" that the majority below adopted; (3) a concise description of why this case is a far better vehicle for resolving the question presented than were any of this Court's prior Voting Rights Act cases; and (4) a discussion, based on the League's extensive experience in the field, of five reasons why the Court should settle this question before the next decennial census kicks off another round of congressional, state-legislative, and local redistricting.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, NW, # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

DECEMBER 21, 2007

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's citizen voting-age population can state a vote-dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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INTEREST OF THE *AMICUS CURIAE*

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process.[1] The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women through the Nineteenth Amendment to the United States Constitution. Today, the League has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

The League has long been a leader in seeking to ensure that redistricting at every level of government promotes full and fair political participation by all Americans. In jurisdiction after jurisdiction, the League and its members participate in the redistricting process following each decennial census. And even before the "reapportionment revolution" commenced with this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the League worked to reform and modernize the redistricting process itself. *See, e.g.*, *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958) (three-judge court).

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[1] Petitioners, but not respondents, have consented to the filing of this brief. Counsel of record for all parties received timely notice of the League's intention to file this brief. No party, counsel for a party, or person other than the League, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

Recognizing that the Constitution's promise of fair and effective representation can never be realized so long as any American citizen's right to vote is denied or abridged, the League supports federal legislation to make the Fifteenth Amendment every bit as effective for minorities as the Nineteenth Amendment has been for women. The League and its members have long supported the Voting Rights Act of 1965, having worked for the reauthorization of Section 5 and the 1982 amendments to Section 2, which guarantee minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The demands of amended Section 2, like all laws constraining redistricting, need to be clear. Otherwise, political mapmakers will treat ambiguities and conflicts in the law as an invitation to gerrymander. The League therefore respectfully asks this Court to grant the petition and clarify whether a vote-dilution claim under Section 2 requires that a minority community's size meet a rigid numerical quota.

SUMMARY OF ARGUMENT

The 2010 census and another round of redistricting are on the horizon. But courts, legislatures, and voters are deeply divided as to one of the critical requirements under Section 2 of the Voting Rights Act: whether a cognizable vote-dilution claim requires that a minority group constitute a literal, mathematical majority of a proposed district's population (the "50% Rule"), or whether instead it suffices if the group constitutes an

effective voting majority in a proposed "coalition district," where minority-preferred candidates can prevail with limited but reliable crossover support from other voters.

Five times, this Court has expressly reserved that question, usually assuming — but never actually deciding — that the Act requires an effective voting majority, not a formalistic and rigid 50.001% majority. Predictably, lower courts have been confused. There is a clear split not only among the circuits, but also among the state courts and three-judge federal district courts that handle much of the Nation's redistricting litigation and whose judgments can be appealed only to this Court, not to the circuit courts. One side in this split takes the position, adopted by the North Carolina Supreme Court below, that the minority group must constitute more than 50% of a district's population, and that coalition-district claims are not cognizable under Section 2 of the Voting Rights Act. That position is in considerable tension with the plain text of the statute, is contrary to the long-standing position of the Justice Department, and is hard to reconcile with this Court's recent, unanimous rejection of the 50% Rule under Section 5 of the Act. The court below ignored or misread these authorities, leaving the false impression that its decision endorsing the 50% Rule fully comported with precedent. *See* Pet. App. 11a-27a.

With the 2010 census just two years away, the confusion exacerbated by the decision below is sure to result in uneven enforcement of minority voting rights during the next round of redistricting,

heightened race-consciousness in district line-drawing, and partisan manipulation of one of our Nation's greatest civil-rights statutes. Voters, whose districts may be redrawn several times following numerous rounds of litigation, can only be harmed by this chaos.

The petition here cleanly presents the issue on a record built largely by stipulation. And this case has none of the flaws that have previously prevented the Court from reaching the issue. The petition for a writ of certiorari should be granted.

ARGUMENT

I. THIS COURT HAS NOT PROVIDED CLEAR GUIDANCE ON WHETHER COALITION-DISTRICT CLAIMS ARE COGNIZABLE UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act prohibits redistricting plans that, "based on the totality of circumstances," are shown to offer members of a protected racial or language minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The plain text of Section 2 thus focuses on minority groups' ability "to elect representatives of their choice." *Id.* Neither Section 2 nor any other part of the Voting Rights Act says anything about "majority-black" or "majority-Latino" or "majority-minority" districts.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court explained that the "essence" of a Section 2 vote-dilution claim is that the challenged districting

plan "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. Section 2 plaintiffs therefore must present some alternative plan that would provide greater opportunity for minority voters to elect candidates of their choice. *See id.* at 46-51.

The *Gingles* Court established three "necessary preconditions" for proving vote dilution under Section 2: The plaintiffs' minority group must show that (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) its preferred candidates "usually" are defeated by white bloc voting. *Id.* at 50-51. The first *Gingles* prong is needed because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. In assessing whether African-American concentrations were sufficiently large "to constitute effective voting majorities in [new] single-member districts" — that is, whether blacks had the "potential" to elect their preferred candidates — the *Gingles* Court eschewed "mechanical" rules and instead applied a "flexible, fact-intensive," and "functional" approach to the political process. *Id.* at 38, 45-46, 58; *see id.* at 48 n.15, 75-80. Specifically, the Court considered — among other "'intensely local,'" district-specific facts — the "size of the district," the "percentage of registered voters in the district who are members of

the minority group," the "number of minority group members [who] usually vote for the same candidates," and the number of "white 'crossover' votes" that those same minority-preferred candidates could reliably expect to attract. *Id.* at 56, 79 (citation omitted).

Nevertheless, the express wording of the first *Gingles* prong has generated two conflicting interpretations. Some have read the term "majority" to mean a literal, mathematical majority. Others have understood the term as referring to an effective voting majority capable of "elect[ing] representatives of [the minority voters'] choice." 42 U.S.C. § 1973(b).

This Court's precedents do not resolve that conflict. In *Gingles* itself, as was typical for voting-rights litigation in the 1980s, the plaintiffs did not propose any new districts where blacks would have constituted less than 50% of the population. The Court therefore had no occasion to consider whether Section 2 permits "a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46-47 n.12. In her concurrence, however, Justice O'Connor noted that voters belonging to such a minority group could nonetheless demonstrate their ability "to elect representatives of their choice" by showing that sufficient "white support would probably be forthcoming in some such district." *Id.* at 90 n.1 (O'Connor, J., concurring in judgment).

This Court's post-*Gingles* cases have continued to leave the issue unresolved. In *Growe v. Emison*, 507 U.S. 25 (1993), the district court had concluded that Section 2 required an "oddly shaped" multiracial

district with a total population that was 43% black and 40% white. *Id.* at 38 & n.4. This Court unanimously reversed because the record contained no statistical evidence of minority political cohesion, the second *Gingles* factor. *Id.* at 41-42. As for the first *Gingles* factor, the Court again expressly declined to decide whether "a minority group not sufficiently large to constitute a majority will suffice." *Id.* at 41 n.5 (citing *Gingles*, 478 U.S. at 46-47 n.12).

Later in the same Term, in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court again unanimously reversed a district court's finding of Section 2 liability, this time because the plaintiffs had failed to demonstrate significant white bloc voting, the third *Gingles* factor. *Id.* at 158. As for the first factor, the plaintiffs had claimed that the State violated Section 2 by failing to draw districts where black voters, though short of a mathematical majority, were sufficiently numerous to elect their candidates of choice "with the assistance of cross-over votes from the white majority." *Id.*; *see id.* at 154. The Court observed: "Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 158. It therefore assumed, without deciding, that the plaintiffs had stated a cognizable Section 2 claim under *Gingles*. *Id.* at 154, 158.

The next Term, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court again reversed a district court's finding of Section 2 liability, this time because the challenged plan already contained enough districts where Hispanic voters could form

"effective voting majorities" capable of electing their chosen representatives. *Id.* at 1000. As before, the Court assumed without deciding that plaintiffs could satisfy the first *Gingles* prong and state a cognizable Section 2 claim even if their minority group fell short of "an absolute majority." *Id.* at 1009. As the Court explained, "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district." *Id.* at 1020. The *De Grandy* Court focused on electoral opportunity, rather than on an absolute numerical majority: "[T]he first *Gingles* condition requires the possibility of creating . . . [additional] districts with a sufficiently large minority population *to elect candidates of its choice.*" *Id.* at 1008 (emphasis added).

The Court's next opportunity to address the issue came when Latino plaintiffs filed petitions for writs of certiorari in *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), and *Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999). In both cases, the Fifth Circuit had required Section 2 vote-dilution claimants to show that their minority group could constitute an absolute numerical majority of a district's citizen voting-age population. *Valdespino*, 168 F.3d at 852-53; *Perez*, 165 F.3d at 372-73. The Court called for the views of the Solicitor General, 528 U.S. 804 (1999), who argued that the Fifth Circuit's "absolute 50% rule" was contrary to this

Court's precedents and warranted review.[2] In the Solicitor General's view, a minority community must show merely that it could "elect representatives of its choice," not that it would "constitute an absolute majority of the population (by any particular measure) in a single-member district."[3] The Justice Department had taken this same position — rejecting any "magical numerical threshold" — in earlier Section 2 cases, dating back at least to 1990.[4] Both Fifth Circuit cases, however, raised thorny factual issues about demographic shifts and naturalization trends since the last census. *See, e.g.*, *Valdespino*, 168 F.3d at 853-55. The Court denied both petitions. 528 U.S. 1114 (2000).

Three years later, in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) — a case that the North Carolina Supreme Court barely mentioned below, *see* Pet. App. 19a — this Court expressly rejected the 50% Rule in the context of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See Ashcroft*, 539 U.S. at 480-85. Although Sections 2 and 5 "'differ in structure, purpose, and application,'" they both protect the right to vote from being abridged on

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[2] Br. for U.S. as *Amicus Curiae* at 6-7, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (No. 98-1987); *see also id.* at 8-15.

[3] *Id.* at 6.

[4] Br. for U.S. at 33-38, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *see also* Br. for U.S. as *Amicus Curiae* at 11, 17-18, *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997). *But see* Br. for U.S. as *Amicus Curiae* at 10, 16, *Voinovich v. Quilter*, 507 U.S. 146 (No. 91-1618).

account of race. *Id.* at 478 (citation omitted). And while the *Ashcroft* Court, interpreting Section 5, was divided about the significance of "influence districts" — which are in no way implicated here[5] — all nine Justices recognized the validity of "coalition districts," where a minority group constituting less than half a district's population nonetheless can elect its candidates of choice when joined by predictably supportive nonminority voters. *See id.* at 480-85; *id.* at 492-93 (Souter, J., dissenting).

Although Congress has since overruled *Ashcroft*'s validation of "influence districts," overwhelming and bipartisan majorities reaffirmed the Court's unanimous recognition of coalition districts. *See* Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (protecting minority citizens' "ability . . . to elect their preferred candidates of choice"), *codified at* 42 U.S.C. § 1973c(b), (d), Pet. App. 125a; *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 216-51 (2007) (interpreting the 2006 statute).

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[5] Although courts (including this one, *see, e.g.*, *Voinovich*, 507 U.S. at 154, 158) sometimes have used the term inconsistently, the *Ashcroft* majority and dissenting opinions correctly defined an "influence district" — in sharp contrast to a coalition district — as one where minority voters can play a substantial, influential role in elections but cannot reliably form winning coalitions with other voters and thus lack any realistic opportunity to elect representatives of their choice. *Ashcroft*, 539 U.S. at 482; *id.* at 493-97 (Souter, J., dissenting). This case does not involve influence-district claims.

Just last year, the Court yet again addressed, but did not resolve, the issue of coalition districts and the 50% Rule. In *LULAC v. Perry*, 126 S. Ct. 2594 (2006), the plaintiffs claimed that Section 2 required Texas to reinstate a district whose adult citizen population was 26% black. *Id.* at 2624. Again, the United States as *amicus curiae* argued against the "flat 50% rule" when the minority group is "compact, politically cohesive, and substantial in size *yet just short of a majority*." Br. of U.S. as *Amicus Curiae* at 19, *LULAC v. Perry*, 126 S. Ct. 2594 (No. 05-276) (citation and internal quotation marks omitted). But the United States asked the Court to reject plaintiffs' claim on the facts because they had failed to prove below that African-Americans could effectively control the 26% black district. *Id.* at 11-17. The United States urged the Court to avoid a definitive ruling on the "strict 50% rule" until "it is faced with a case in which resolution of the question would likely be dispositive. . . . Such a case would offer the Court the benefit of a concrete factual setting in which to resolve that issue." *Id.* at 20, 24.

Again, the Court declined to settle the issue. Writing for the plurality, Justice Kennedy stated: "As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population." *Perry*, 126 S. Ct. at 2624 (citing *De Grandy*, 512 U.S. at 1009; *Voinovich*, 507 U.S. at 154; *Gingles*, 478 U.S. at 46-47 n.12). The plurality saw no clear error in the trial court's finding that whites, rather than African-Americans, controlled the district's

Democratic primaries, in which a white incumbent repeatedly had gone unchallenged. *Id.* at 2624-25. Therefore, the plaintiffs had not demonstrated that their district truly provided black voters an equal "opportunity 'to elect representatives of their choice.'" *Id.* at 2625 (quoting 42 U.S.C. § 1973(b)).

The Chief Justice, in an opinion joined by Justice Alito, also focused on effective opportunities to elect candidates of choice. He explained that Section 2 plaintiffs must "show that an alternative [redistricting plan] would present better prospects for minority-preferred candidates" by creating either additional "majority-minority" districts or additional coalition districts where a minority group could elect candidates of its choice with "'cross-over votes from other ethnic groups.'" *Id.* at 2654-55 (Roberts, C.J., dissenting in part) (quoting *De Grandy*, 512 U.S. at 1008, and citing *Voinovich*, 507 U.S. at 154) (emphasis omitted).

In his partial dissent, Justice Souter, joined by Justice Ginsburg, suggested that the Court should stop "sidestepp[ing] the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%." *Id.* at 2648. Justice Souter explained that he would "hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage." *Id.* "To have a clear-edged rule," Justice Souter would allow Section 2 plaintiffs to show that minority voters in a proposed district "constitute a majority of those voting in the primary of the

dominant party, that is, the party tending to win in the general election." *Id.*[6]

Justice Stevens "agree[d] with Justice Souter that the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry." *Id.* at 2645 n.16 (Stevens, J., dissenting in part) (citation omitted).

II. THE LOWER COURTS ARE DEEPLY DIVIDED ON THIS IMPORTANT FEDERAL QUESTION.

The Court's Voting Rights Act opinions have left lower courts, both federal and state, in an unenviable spot. On the one hand, the plain text of the statute, supported by numerous passages from this Court's opinions, focuses on whether districts can elect minority-preferred representatives. *See* 42 U.S.C. § 1973(b). On the other hand, some lower courts, such as the North Carolina Supreme Court here, have read the first *Gingles* factor to demand proof that a minority group can constitute a literal, mathematical "majority" of a district's population. *Gingles*, 478 U.S. at 50.

Of course, the *Gingles* Court that coined the "majority" requirement was construing Congress's

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[6] Justice Souter also recognized that "a minority group might satisfy the § 2 'ability to elect' requirement in other ways" and did not "rule out other circumstances in which a coalition district might be required by § 2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups." *Id.* at 2648 n.3.

text, not overruling it. The word "majority" in *Gingles* and its progeny should therefore be understood to effectuate the statutory text guaranteeing minority voters an equal "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). After all, the language of a judicial opinion must be "read in context" and not "parsed" like a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979).

The lower courts, however, remain deeply confused and divided, and many of them have reached a conclusion opposite to that of the North Carolina Supreme Court. For example, in *McNeil v. Legislative Apportionment Commission*, 828 A.2d 840 (N.J. 2003), a case with facts remarkably similar to this one, voters residing in Newark and Jersey City complained that their cities were each divided among three, rather than two, legislative districts, in violation of the state constitution's whole-municipality provision. *See id.* at 844-45. The State argued that Section 2 required trisecting each city to create more opportunities for African-American and Latino citizens to elect their preferred candidates in coalition districts. *See id.* The New Jersey Supreme Court agreed, holding that strict adherence to the state constitution's whole-municipality provision would pack minority voters into too few districts and thus "dilute minorities' ability to elect representatives of their choice," in violation of Section 2. *Id.* at 857. The court explained: "'[N]othing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters.'" *Id.* at 853

(citation omitted). The North Carolina court did not cite the New Jersey case.

The First Circuit's en banc decision in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004), also rejected the flat 50% Rule. Inexplicably, the majority below misread *Metts* as leaving this issue "unresolved." Pet. App. 22a. In *Metts*, African-American voters challenged Rhode Island's state senate plan and proposed a coalition district in Providence, but the trial court dismissed their case under Rule 12(b)(6) for failure to state a claim. That judgment was reversed by a divided panel of the First Circuit, with Judge Lynch writing a lengthy majority opinion canvassing the arguments for and against the 50% Rule. *Metts v. Murphy*, 347 F.3d 346, 2003 WL 22434637 (1st Cir. 2003) (withdrawn).

On rehearing en banc, the First Circuit addressed "how to apply *Gingles* when no racial group makes up more than 50 percent of the district" and "whether the 'majority' requirement in *Gingles* is a numerical majority or an effective majority that could be constructed [with] cross-over votes." *Metts*, 363 F.3d at 11. If Section 2 mandated a "numerical majority," the district court's dismissal would have been affirmed; but instead, the en banc court vacated the dismissal and remanded the case to allow the African-American plaintiffs to develop evidence showing that their preferred candidate could predictably garner enough "cross-over support from other groups" to render a proposed coalition district viable under Section 2. *Id.* at 11-12. On remand, the case settled after the State agreed to create a coalition district where Providence's African-

American community could, and in fact did, elect its preferred candidate, who now serves as the Rhode Island Senate's sole African-American member and Deputy Majority Leader.

The positions staked out by the First Circuit en banc and the New Jersey Supreme Court resonate with opinions from at least half a dozen three-judge federal district courts, each of which included at least one circuit judge. *See* 28 U.S.C. § 2284(b)(1). Even before this Court decided *Gingles*, the Northern District of Mississippi, in a decision this Court summarily affirmed, recognized that Section 2 could protect a 42% black district.[7] And after *Gingles*, three-judge courts in the Northern District of Ohio,[8] the Western District of Arkansas,[9] the Eastern and Southern Districts of New York,[10] and the Southern

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[7] *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court), *summarily aff'd sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

[8] *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three-judge court) (approving a district where blacks would "constitute nearly one-third of the voting age population and about half of the usual Democratic vote").

[9] *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (Richard S. Arnold, C.J.) (stating that plaintiffs could present a viable coalition-district claim if "minority voters could join with enough non-minority voters to form a majority").

[10] *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694-95 (E.D.N.Y. 1992) (three-judge court) ("[T]here is no bright-line rule for discerning an appropriate VAP [voting-age population] level within a district that passes Voting Rights Act muster. . . . This case-by-case approach is

District of Florida[11] all declined to adopt the absolute 50% Rule. The majority below failed to cite five of these six cases. *See* Pet. App. 17a-27a.

On the other side of the split, the Fourth, Fifth, Sixth, and Seventh Circuits all have upheld the 50% Rule and rejected coalition-district claims.[12] And now they have been joined by the Supreme Court of North Carolina. Pet. App. 27a.

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underscored by the realities that every redistricting case is unique, that the line between 'packing' minorities and 'fragmenting' them is frequently a thin one, and that each redistricting effort requires an extremely fact-intensive evaluation."); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 373-77, 381-404 (S.D.N.Y.) (three-judge court) (rejecting a Section 2 claim because plaintiffs failed to show that their proposed 37% black district could actually elect minority-preferred candidates), *summarily aff'd*, 543 U.S. 997 (2004).

[11] *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320 n.56 (S.D. Fla. 2002) (three-judge court) (doubting that *Gingles*'s first factor "was intended as a [illegible]ral, mathematical requirement"); *id.* at 1322 (criticizing "the approach of focusing mechanically on the percentage of minority population (or voting-age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters").

[12] *Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004); *Valdespino*, 168 F.3d at 852-53; *Perez*, 165 F.3d at 372-73; *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998); *Nixon v. Kent County*, 76 F.3d 1381, 1391-92 (6th Cir. 1996) (en banc); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942-48 (7th Cir. 1988); *see also Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court), *summarily aff'd*, 540 U.S. 1013 (2003). The majority below failed to cite four of these seven cases.

But even these courts diverge on a key related question: Do minority plaintiffs need to show a 50% majority of voting-age population ("VAP") or of citizen voting-age population ("CVAP")? The Seventh Circuit's position is unclear; the Fourth and Sixth Circuits require a VAP majority; and the Fifth Circuit and the North Carolina Supreme Court require a CVAP majority, which generally is easier for African-Americans and American Indians to satisfy, but much harder for Latinos and Asian-Americans. *See supra* note 12 (citing cases); Pet. App. 17a.

The lower courts that have taken some position on the coalition-district issue — rejecting the 50% Rule, adopting the 50% VAP Rule, or adopting the 50% CVAP Rule — collectively have jurisdiction over more than 56% of the Nation's minority population.[13] Allowing this issue to percolate longer will only exacerbate, not cure, the split among the lower courts.

III. THIS CASE IS THE PERFECT VEHICLE FOR RESOLVING THE ISSUE.

This case presents a clean opportunity to resolve the Section 2 issue that this Court repeatedly has left open and that now divides the lower courts. The case was decided on cross-motions for summary judgment, and the key facts were stipulated. Pet. App. 6a-9a. Moreover, the validity or invalidity of

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[13] *See* U.S. Bureau of the Census, Population by Race and Hispanic or Latino Origin, *available at* http://www.census.gov/population/cen2000/phc-t6/tab01.xls.

North Carolina House District 18 turns on one and only one issue: whether the 50% Rule is correct. The case therefore avoids the various obstacles that prevented the Court from deciding this issue earlier.

Unlike *Gingles*, this case presents a concrete example of a coalition district, where African-Americans, constituting only 43% of the district's total population, can coalesce with enough white voters to nominate and elect their preferred candidates. Pet. App. 46a.

Unlike *Growe*, this case involves a district that is geographically compact (see color map, *id.* at 132a), and the parties stipulated that the African-American community in and around Wilmington is politically cohesive. *Id.* at 98-103a, 129a-130a.

Unlike *Voinovich*, this case includes the parties' stipulation that the white majority in New Hanover and Pender Counties votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. *Id.* at 9a, 114a, 129a-130a.

Unlike *De Grandy*, this case presents undisputed evidence that African-American citizens cannot elect candidates of their choice in a number of districts roughly proportional to their share in the statewide population, even with District 18 performing solidly as a coalition district. *Id.* at 60a.

Unlike *Valdespino* and *Perez*, this case presents no thorny factual issues about demographic or naturalization trends since the last census. *Id.* at 5a.

Unlike *Ashcroft*, this case presents a pure Section 2 issue, as neither New Hanover nor Pender County

is covered by Section 5 of the Voting Rights Act. *Id.* at 64a.

And unlike *Perry*, this case deals with a district that has now twice nominated and elected an African-American representative who, by garnering overwhelming support from the black community and limited but reliable crossover support from some white voters, has staved off an array of challengers, black and white, Democratic and Republican. *Id.* at 46a.

One could hardly design a better vehicle than this case for resolving the "important question of federal law" presented in the petition. S. CT. R. 10(c).

IV. FAILING TO SETTLE THIS ISSUE BEFORE THE 2010 CENSUS WILL GENERATE NEEDLESS TURMOIL IN THE NEXT DECENNIAL ROUND OF REDISTRICTING.

Leaving the proper interpretation of Section 2 unresolved could wreak havoc on the congressional, state-legislative, and local redistricting that will follow the 2010 census.

1. As this case amply demonstrates, even when circuit precedent is clear, intra-circuit confusion will abound in the state courts, where redistricting litigation typically begins. *See Growe*, 507 U.S. at 32-37. Here, for example, the Fourth Circuit's unequivocal adoption of the 50% Rule in *Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004), did not prevent a unanimous three-judge state trial court, as well as the dissenting justices on the North Carolina Supreme Court, from rejecting that rule and holding coalition-district claims cognizable. Pet.

App. 44a-45a, 90a-92a. After all, no state-court judgment is appealable to the Fourth Circuit.

2. If the Court resolves this issue *after* the 2010 census, States that redrew their districts in 2011 or 2012 based on what turns out to be the "wrong" interpretation of Section 2 will be sued and forced to engage in mid-decade "re-redistricting" to cure their Section 2 violations. The best time to resolve the question presented here is shortly before the census.

3. Absent timely resolution by this Court, ambiguity in Section 2 will leave too much unchanneled discretion in the hands of political line-drawers. The latitude to draw district lines based on either of two contrary interpretations of Section 2 will add one more weapon to politicians' arsenals in the gerrymandering wars. Legislators from a State's dominant political party will adopt whichever interpretation suits their partisan interests. And legislators from the "out" party will couch their partisan grievances in race-based terms, injecting racialized arguments into the legislative record to lay the groundwork for an eventual Section 2 challenge in court. It would be a bitter irony indeed if this Court's inaction transformed the Voting Rights Act into a tool for burdening representational rights.

4. Absent clear guidance from this Court, States that draw coalition districts, such as the 43% black district at issue here, may be dragged into court for failing to draw 50.001% black (or Latino) districts instead. *See Growe*, 507 U.S. at 38 n.4 (suggesting that the measure of whether a Section 2 violation has occurred is also the measure of whether a Section 2 violation has been remedied); Pet. App.

33a. Indeed, on the very day North Carolina's election officials filed their petition in this Court, they were sued on precisely this basis in federal district court. *See* Complaint at 36-38, *Dean v. Leake*, No. 2:07-CV-00051-FL-AD-RC (E.D.N.C. 2007). Plaintiffs in that case claim that Section 2 now requires the State to extend House District 18 beyond the Wilmington metropolitan area and media market, deep into the Mid-Carolina region, just to push the district's citizen voting-age population above 50%. That sort of lawsuit should be nipped in the bud. No State should be held liable for creating a reasonable number of geographically compact districts where minority voters can coalesce with other voters "to elect representatives of their choice." 42 U.S.C. § 1973(b).

Indeed, the mere threat of such lawsuits inevitably will encourage racial gerrymandering of the type this Court condemned in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). In many areas, rejiggering an indisputably compact coalition district to push its minority percentage up over an artificial 50% black or 50% Latino threshold will require shooting narrow tentacles out from the district's central core to grab distant pockets of minority population. *See Bush v. Vera*, 517 U.S. 952, 965-73 (1996) (plurality opinion). States will find themselves in the same quandary they faced during the 1991-1992 redistricting, feeling pressure to violate the Equal Protection Clause in order to comply with the Voting Rights Act. *See Miller*, 515 U.S. at 927-28.

5. The issue presented here will only grow in importance in the coming years, because the opportunities to elect minority candidates from coalition districts are increasing over time.

In the early years of Voting Rights Act enforcement, it was widely believed that minority districts could overcome white bloc voting and elect minority-preferred candidates only if the minority group constituted at least 65% of the total population. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984). Later, the effectiveness threshold was thought to have dropped to about 50%. Today, as this Court recognized in *Ashcroft*, political scientists agree that in many places that figure has declined by another 10 or 15 percentage points.[14]

In 1982, when Congress last amended Section 2, only four African-American Members of Congress hailed from districts whose voting-age populations were less than half black.[15] By contrast, today, most of the 41 African-American Members of Congress represent such constituencies, and there remains only one congressional district in the entire Nation

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[14] *See Ashcroft*, 539 U.S. at 480, 483 (citing Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002)).

[15] *See* POLITICS IN AMERICA 1982, at 103, 150, 156, 1190 (1981).

that is at least 65% black.[16] This progress in overcoming racial isolation should be celebrated, not stymied.

At the same time, no one should ignore the empirical reality that the threshold at which minority voters have a better-than-even chance of electing their preferred candidates varies significantly depending on the State, the particular area within a given State, and the particular minority group or groups at issue. *Compare, e.g.*, *Page v. Bartels*, 144 F. Supp. 2d 346, 362-66 (D.N.J. 2001) (three-judge court) (holding that a 27.5% black district satisfied Section 2), *with Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007) (holding that a 54.5% Indian district did not satisfy Section 2).

All of this suggests that rejecting rigid numerical quotas and interpreting Section 2 flexibly will allow the Voting Rights Act's strictures to ratchet down as politics and housing patterns become increasingly integrated and as minority leaders build their capacity to "pull, haul, and trade" with their white counterparts. *De Grandy*, 512 U.S. at 1020. Over time, majority-black and majority-Latino districts will continue to be replaced by coalition districts, many of which will come to resemble microcosms of our increasingly diverse Nation. And the Voting Rights Act will naturally unwind itself, as it helps

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[16] *See* CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS 1143, 1160 (2007).

pave our "transition to a society where race no longer matters." *Ashcroft*, 539 U.S. at 490.

For these reasons, the Court should grant the petition and settle the question whether Section 2 of the Voting Rights Act recognizes the viability of coalition districts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, NW, # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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78

IN THE

Supreme Court of the United States

GARY BARTLETT *et al.*,
Petitioners,

v.

DWIGHT STRICKLAND *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NAACP, CINDY MOORE, MILFORD FARRIOR, AND MARY JORDAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PAMELA KARLAN
559 Nathan Abbott Way
Stanford, CA 94305

THOMAS GOLDSTEIN
AKIN, GUMP, STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4000

ANITA EARLS
Counsel of Record
6 Superior Ct.
Durham, NC 27713

ANGELA CICCOLO
Acting General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote-dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NAACP, CINDY MOORE, MILFORD FARRIOR AND MARY JORDAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.2(b), the National Association for the Advancement of Colored People ("NAACP"), Cindy Moore, Milford Farrior, and Mary Jordan hereby move for leave to file the attached *amicus curiae* brief in support of the petition for certiorari in this case.

The NAACP is the nation's oldest and largest civil rights organization. The NAACP has affiliates and members nationwide, including over 100 branches with more than 20,000 members in North Carolina. This Court has long recognized the NAACP's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The experience of the NAACP and its affiliates and members in litigating cases under section 2 of the Voting Rights Act shows the importance of having the Court resolve the question presented in this case.

Amici Moore, Farrior, and Jordan are African-American citizens, voters, and residents of Pender County, North Carolina. Their state legislative district is the subject of this lawsuit. Under the 2003 redistricting plan at issue in this case, they were able to elect a representative of their choice to the North Carolina General Assembly, but if the North Carolina Supreme Court's decision is allowed to stand, they will no longer be able to elect such a representative.

Counsel for proposed *amici* made a good-faith effort to obtain the consent of all parties to the filing of their brief. Petitioners have consented to the filing of this brief. Counsel for respondent indicated that he would be unable to consent because one of his clients cannot be reached and he is unable to provide consent without his client's approval.

Wherefore, the NAACP, Cindy Moore, Milford Farrior and Mary Jordan respectfully move for leave to file this brief.

Respectfully submitted,

ANGELA CICCOLO
PAMELA KARLAN
THOMAS GOLDSTEIN

ANITA EARLS
Counsel of Record

DECEMBER 2007

INTEREST OF THE *AMICI CURIAE*[1]

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization. The NAACP has affiliates and members nationwide, including over 100 branches with more than 20,000 members in North Carolina. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

Since its founding, the NAACP has been involved in litigation on behalf of minority voters as well as in the legislative efforts that culminated in the passage, amendment, and extension of the Voting Rights Act of 1965. This Court has long recognized the NAACP's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The

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[1] Consent of all parties of record was requested ten days in advance of the filing of this brief, but was not received, necessitating the motion that precedes this brief. No party, counsel for a party, or person other than the *amici*, the members of *amicus* NAACP, or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

experience of the NAACP and its affiliates and members in litigating cases under section 2 of the Voting Rights Act shows the importance of having the Court resolve the question presented in this case.

The individual *amici* – Cindy Moore, Milford Farrior, and Mary Jordan – are African-American citizens, voters, and residents of Pender County, North Carolina. They are members of various civic and social organizations that sponsor voter registration and voter education efforts in the African-American community. Under the 2003 redistricting plan at issue in this case, they were able to elect a representative of their choice to the North Carolina General Assembly, a representative who is familiar with, and responsive to, the needs of their community. If the decision of the North Carolina Supreme Court is allowed to stand, however, they will no longer be able to elect such a representative.

SUMMARY OF ARGUMENT

Since this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court and the lower courts have repeatedly confronted the question whether the Voting Rights Act requires the creation of "coalitional districts," *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003): districts that are less than 50% black (or Latino) in voting-age population but which nonetheless enable minority voters to elect the candidates of their choice, given minority political cohesion and sufficient white crossover votes. For doctrinal and practical reasons, the time has come

for this Court to answer that question and to hold that minority plaintiffs can bring section 2 lawsuits seeking the creation of coalitional districts.

First, the Voting Rights Act has always required an "'intensely local appraisal'" of whether "the absence of [a particular majority-minority] district constitutes impermissible vote dilution." *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2620 (2006) (quoting *Gingles*, 478 U.S. at 79 and *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). Today, as a result of small but sometimes significant changes in the level of racial bloc voting, minority voters in some jurisdictions are able to elect candidates of their choice from coalitional districts. The failure to create such districts (or the decision to eliminate such districts where they now exist) would therefore deny minority voters the ability to elect representatives of their choice protected by section 2. Continued insistence on a rigid 50% rule – under which minority voters are protected only if they can show the possibility of creating a majority-minority district and in which the remedy they receive if they prevail must be a majority-minority district – threatens both to leave some minority voters unprotected and to require the unnecessary packing of other minority voters.

Second, this Court's decision in *Georgia v. Ashcroft* recognized, under section 5 of the Voting Rights Act, that coalitional districts can serve as a means of complying with the Voting Rights Act's requirement that covered jurisdictions provide minority voters with an undiminished opportunity to elect representatives of their choice. Although

sections 2 and 5 of the Act are not identical, they do operate in complementary ways, and this Court should now clarify that coalitional districts can also be an appropriate remedy – and the failure to create such districts can serve as a trigger for liability – under section 2.

ARGUMENT

In *Gingles*, this Court laid out a framework for assessing claims of racial vote dilution under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. Among other things, section 2 forbids states from using districting plans that "result" in members of minority groups "hav[ing] less opportunity than other members of the electorate . . . to elect representatives of their choice." The Court identified three "preconditions" whose presence it thought "necessary" for plaintiffs to establish in order to show impermissible vote dilution through the use of multimember districts. *Gingles*, 478 U.S. at 50. The first of these preconditions – the one centrally at issue in this case – provides that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. In a footnote, however, the Court observed that the case before it presented "no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitution a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." *Id.* at 46 n.12.

Over the past twenty years, this Court has clarified the *Gingles* analysis in some respects, but it has left other critical issues unresolved. In *Growe v. Emison*, 507 U.S. 25 (1993), and *Johnson v. De Grandy*, 512 U.S. 997 (1994), for example, this Court held that the *Gingles* factors should apply to claims of vote dilution in the configuration of single-member districts as well as to challenges to multimember systems. And in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a case arising under section 5 of the Voting Rights Act,[2] this Court held that a state can sometimes meet its obligation to avoid diluting minority voting strength by constructing "coalitional districts," *id.* at 483, in which minority voters, albeit a minority of the electorate, nonetheless have the

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[2] Section 5, 42 U.S.C. § 1973c, applies only to specified "covered" jurisdictions. *See* 42 U.S.C. § 1973b(b). Forty counties in North Carolina are covered jurisdictions. *See* 28 C.F.R. Part 51 Appendix (2007). Section 5 forbids these covered jurisdictions from making any change in their existing voting practices without first proving that the change will have neither a discriminatory purpose nor a discriminatory effect. Under this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976), a change has a discriminatory effect if it results in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. As this Court explained in *Georgia v. Ashcroft*, because sections 2 and 5 "differ in structure, purpose, and application," 539 U.S. at 478 (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion)), the relative stringency of the two provisions can differ from case to case: sometimes, practices that pass muster under section 2 will nonetheless run afoul of section 5, while other times practices that receive preclearance under section 5 will nonetheless later be held to violate section 2, as was the case in *Gingles* itself.

ability to build bi- or multi-racial coalitions to elect representatives of their choice. But as the State of North Carolina notes in its petition for certiorari, this Court has repeatedly left open the question whether minority voters can use section 2 to *require* the construction of such districts. *See LULAC v Perry*, 126 S. Ct. 2594, 2624 (2006); *Johnson v. De Grandy*, 512 U.S. at 1008-09; *Growe*, 507 U.S. at 41 n.5 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993).

That question may originally have seemed to be primarily of academic interest, given that high levels of racial bloc voting in many jurisdictions prevented minority voters from electing their preferred candidates unless they constituted a majority of the electorate. But over the twenty-five years since the amendments to section 2, many jurisdictions have seen a decline in racial bloc voting that enables minority voters, under some circumstances, to form coalitions with like-minded white voters to elect a candidate sponsored by the minority community. Even in many of these communities, however, the level of white crossover voting remains sufficiently low that creating a coalitional district requires including a large minority community within the putative coalitional district. If the jurisdiction instead splits a geographically compact and politically cohesive minority community among several districts, then minority voters will remain unable to participate equally in the political process and to elect candidates of their choice.

This Court has long recognized that vote dilution cases require "a searching practical evaluation of

past and present reality." *Johnson v. De Grandy*, 512 U.S. at 1018 (quoting S. Rep. No. 97-417 at 30 (1982), and *White v. Regester*, 412 U.S. 755, 776, 770 (1973)); *see Gingles*, 478 U.S. at 66, 75, 79. *LULAC v. Perry*, 126 S. Ct. 2594, 2621 (2006) (conducting a detailed totality-of-the-circumstances inquiry into the political reality of southern Texas in concluding that the state had violated section 2). Given the present realities of nascent coalitional politics and continued racial bloc voting, this Court needs to clarify that section 2 reaches lawsuits by minority voters who have been denied the right to elect candidates of their choice in coalitional districts.

I. THE 50% RULE CONSTRAINS AND PENALIZES PROGRESS MADE TOWARDS AMELIORATING RACIALLY POLARIZED VOTING.

When section 2 was amended in 1982, it was true in many jurisdictions that minority voters needed to be 65% of the electorate in order to have a realistic chance of electing a candidate of their choice. *See, e.g., Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (describing it as "a rule of thumb that blacks must be at least 65 percent of the total population of a district in order to be able to elect a black," given the age distribution, levels of registration and voter eligibility, turnout, and racial bloc voting); *Latino Political Action Comm. v. Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (holding that "where voting is highly polarized, a 65 percent figure is a generally accepted threshold which has been used by the Department of Justice and reapportionment experts"); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 & 1413-16 (7th Cir. 1983), *cert.*

denied, 471 U.S. 1135 (1985) (holding that the district court had abused its discretion in failing to create districts with a minority supermajority of 60 to 65% of the population as a remedy for a section 2 violation); *see also* Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act – Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, n.3 (1983) (noting that the Department of Justice often assumed that a district would provide minority voters with a chance to elect a candidate of their choice only when minorities constituted a supermajority of the district's population).

Yet even as early as *Thornburg v. Gingles* itself, Justice O'Connor recognized that districts which are less than 50% minority can enable minority voters to elect their candidate of choice when there is less severe racially polarized voting and minority candidates receive some white crossover votes. Her opinion concurring in the judgment noted that:

> when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Gingles, 478 U.S. at 106 n.1 (emphasis in original).

The analysis offered by Justice O'Connor stands in sharp contrast to the reasoning of courts such as the Fourth Circuit, which have imposed a rigid rule that minority voters cannot maintain a section 2 claim unless they constitute a majority of the population within a proposed district and have insisted "minority voters have the potential to elect a candidate *on the strength of their own ballots*" alone. *Hall v. Virginia*, 385 F.3d 421, 429 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (emphasis in original). Using this cramped definition of what it means to be able to elect a candidate of choice, the *Hall* court concluded that section 2 protects minority voters only when they can create majority-minority districts; it provides no protection when they can create districts that are less than 50% minority but from which minority voters can elect their preferred candidates. This conclusion is out of step with modern political reality and indeed inhibits the very progress that the Voting Rights Act is intended to achieve.

In the twenty years since the *Ketchum* 65% standard was appropriate, racially polarized voting has decreased in some places, making it possible for minority voters to elect their candidates of choice even when they are less than 50% of the population of a district. The 1982 state legislative elections that formed the backdrop against which *Gingles* was decided resulted in no African Americans being elected to the state senate. Even then, however, five black candidates won seats in multi-member State House districts that were 21% to 36% black. *See*

Gingles, 478 U.S. at 75 & n.35. Today, there are seven African Americans in the North Carolina Senate. While all of them represent districts with significant black populations, none of them serves a district that has a black majority in voting-age population. And eleven African-American members of the North Carolina state house represent districts that range from 39.36 to 49.97% black in voting-age population. To be sure, even with this decrease in racially polarized voting, black voters have not been able to achieve proportionality: While African Americans are approximately 20% of the voting age population in North Carolina, they are able to elect candidates of choice in only 14% of the state's senate districts and 16% of the state's house districts. But this level of progress was achieved only because the state has drawn districts with significant black populations. Black voters who have been assigned to districts with smaller minority populations remain unable to elect the representatives of their choice. Under the rigid 50% rule, the State would be free, as a matter of section 2, to eliminate all these districts and thus relegate African Americans to only token representation in the General Assembly.

The North Carolina experience is replicated elsewhere in the United States. After studying twenty southern elections from the 1990s, political scientists Bernard Grofman, Lisa Handley, and David Lublin concluded that the question whether minority groups can elect their candidate of choice cannot be reduced to a single cut-off number, but must be based on the political realities of each case:

> As our analysis of recent congressional elections in the South—and state legislative contests in South Carolina—clearly demonstrates, no simple cutoff point of 50% minority or any other percent minority guarantees minority voters an equal opportunity to elect candidates of choice. A case-specific functional analysis, which takes into account such factors as the relative participation rates of whites and minorities, and the degree of cohesion and crossover voting that can be expected, as well as the type of election . . . and the multi-stage election process, must be conducted to determine the percentage minority necessary to create an effective minority district.

What Minority Populations Are Sufficient To Afford Minorities a Realistic Chance To Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence 79 N.C. L. REV. 1383, 1423 (2001). Grofman, Handley, and Lublin conclude that in most cases African-American voters needed to constitute only 33-39% of the voters to give an African-American candidate 50% of the votes. *See id.* at 1409.[3]

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[3] For other studies arguing that coalitional districts can sometimes be an effective method for achieving minority representation, see, *e.g.*, Ellen D. Katz, *The Law of Democracy: New Issues In Minority Representation: Resurrecting the White Primary* 153 U. PA. L. REV. 325, 368 (2004); David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 39-48 (1997); David Lublin, *Racial Redistricting and African-American Representation: A*

In the face of this progress, a rigid 50% rule misreads the intent and purpose of the Voting Rights Act, reads section 2 of the Act inconsistently with section 5, and, most tragically, denies protection to some of the very districts that have proven to be effective in providing minority voters an equal opportunity to elect representatives of their choice.

If districts that are 40 to 50% minority in voting age population are not protected under section 2 of the Voting Rights Act, one of two things will happen, neither of which is desirable. Either jurisdictions will draw new districts that pack black voters in higher percentages than are necessary to elect the minority community's candidates of choice, or, except where protected by the non-retrogression principle of section 5 of the Voting Rights Act, states will be free to dismantle coalitional districts for any reason, including purely partisan considerations, and minority voters will be subjected once again to unreachable vote dilution.

II. THE CURRENT SITUATION IN NORTH CAROLINA AND AROUND THE COUNTRY SHOWS WHY IT IS CRITICAL FOR THIS COURT TO CLARIFY THE

Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" 93 AM. POL. SCI. REV. 183, 185 (1999); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1535-36, 1555 (2002); Note, *The Ties That Bind: Coalitions and Governance Under Section 2 the Voting Rights Act*, 117 HARV. L. REV. 2621, 2625 (2004).

SCOPE OF SECTION 2 BEFORE THE NEXT REAPPORTIONMENT BEGINS.

The rigid 50% rule adopted by the North Carolina Supreme Court in this case may result in the immediate redrawing of all of the state's House and Senate districts on the eve of the 2008 elections. This case formally challenged just one of North Carolina's House districts. Pet. App. 2a & n.1. However, the North Carolina Supreme Court recognized that its decision would require "redistrict[ing] not only House District 18 but also other legislative districts directly and indirectly affected by this opinion." Pet. App. 33a. While it is unclear whether the court was referring to adjacent house districts that would be necessarily affected by any change to the boundaries of House District 18, or whether some additional legislative districts that are less than 50% black and cross county lines should also be redrawn, the North Carolina Supreme Court was clear that "[t]o minimize disruption to the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election." Pet. App. 34a.

As the petition in this case was being filed, however, another group of twelve individual voters filed suit in the United States District Court for the Eastern District of North Carolina, asking that court to enter a preliminary injunction prohibiting the use of the current house and senate districts in the 2008 election. *Dean v. Leake*, No. 2-07-CV-51-FL, (E.D.N.C. filed Nov. 21, 2007). Their complaint attacks every coalitional district as an unconstitutional racial gerrymander that cannot be

justified by a compelling governmental interest in complying with the Voting Rights Act because the districts "fail to meet the standards for creation of Voting Rights Act districts in that these districts fail to contain a majority of minority voting age population." Complaint ¶ 143. The Dean plaintiffs ask the federal court to compel the legislature to draw a new redistricting plan or implement a court-drawn plan in time for the 2008 elections. *Id.* ¶ 153.

Thus, the ruling in this case now imperils all of the state's Senate districts and over half of the state's House districts that currently provide black voters in North Carolina with an opportunity to elect their representatives of choice. The Dean plaintiffs would effectively force the legislature either to pack black districts with more black voters than are necessary to provide a reasonable opportunity to elect a representative of choice or to abandon altogether the provision of fair representation for the state's black voters.

Ultimately the 50% rule, if imposed nationally following the 2010 round of redistricting, would dramatically decrease the number of African-American representatives in state legislatures around the country and in Congress. Both of North Carolina's congressional districts that elect black voters' candidates of choice are less than 50% black in voting age population. Nationally, twenty-two of the forty-two members of the Congressional Black Caucus are elected from districts that are less than 50% black in voting-age population. *See* www.cbcfinc.org/pdf/constituents.pdf. (last visited Dec. 20, 2007). While some of these districts are in

jurisdictions covered by section 5 of the Voting Rights Act and would presumably be protected by the non-retrogression principle during the post-2010 Census round of redistricting, *see Georgia v. Ashcroft*, those that are in non-covered jurisdictions could be vulnerable to being dismantled without recourse for minority voters. The fact that the question whether section 2, like section 5, protects districts that provide minority voters a realistic opportunity to elect representatives of choice has been presented to this Court and the lower courts so many times already, *see supra* at 8; *see also, e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999) *cert. denied*, 528 U.S. 1114 (2000); *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005), shows that the issue will continue to arise and is an important one to resolve before the next round of redistricting begins at the local, state and federal levels throughout the country.

III. THIS COURT'S DECISION IN *GEORGIA V. ASHCROFT* REQUIRES ADDRESSING WHETHER A SIMILAR ANALYSIS SHOULD GOVERN SECTION 2 CASES AS WELL.

In *Georgia v. Ashcroft*, this Court expressly rejected a rigid 50% rule in the context of section 5. *See* 539 U.S. at 480-85. All nine Justices agreed that coalitional districts which provide minority voters a demonstrable opportunity to elect their representatives of choice with some white crossover votes are a valid means of complying with section 5's

requirement that covered jurisdictions not diminish minority voter's effective exercise of the franchise. *See id.* 480-85 (opinion of the Court); *id.* at 492-93 (Souter, J., joined by Stevens, Ginsberg & Breyer, JJ., dissenting) (distinguishing between coalitional districts and "influence districts," which cannot satisfy the non-retrogression requirement). Throughout both the majority and dissenting opinions' analyses, the touchstone is the ability to elect a candidate of choice, not a bright-line 50% rule.

The Court noted that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine." 539 U.S. at 480. It did not hold that minority voters are entitled to have the ability to elect their candidates of choice protected only if they live in a majority-minority district. The dissent made this point even more clearly, explaining that "[t]he prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters." *Id.* at 492.

The actual electoral experience in North Carolina and elsewhere confirms that minority voters in many jurisdictions can elect a representative of choice through coalitional districts as efficiently as through majority-minority districts, depending on the

political realities of each case. As the trial court in this case found:

> The proper factual inquiry in analyzing a 'coalition' or an 'ability to elect district', in our opinion, is not whether or not black voters make up the majority of voters in the single-member district, but whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single member district operate to make the black voters a **de facto** majority that can elect candidates of their own choosing.

Pet. App. 93a (emphasis in original). This understanding of what it means to be able to elect a candidate of choice is as true under section 2 of the Voting Rights Act as it is under section 5.

IV. IF SECTION 2 IS TO TREAT THE EXISTENCE OF COALITIONAL DISTRICTS AS A DEFENSE TO LIABILITY, THEN IT SHOULD ALSO TREAT THEIR ABSENCE AS POTENTIALLY ACTIONABLE.

In a number of section 2 cases, courts have rejected claims seeking the creation of majority-minority districts by pointing to the fact that minority voters are already electing candidates of their choice from coalitional districts. In *Gingles*, for example, this Court held that North Carolina House District 23, a three-seat multi-member district which was approximately 36% black and which had elected

an African-American to one of the three seats in the past six elections, provided black voters with an equal opportunity to elect their representatives of choice and thus single-member districts were not required in that area of the state. *See Gingles*, 478 U.S. at 77. More recently, lower courts have denied relief to plaintiffs seeking single-member majority-minority districts where minority voters' candidates of choice win in districts that are less than 50% minority. *See, e.g., United States v. Alamosa Co.*, 306 F. Supp. 2d 1016 (D. Colo. 2004) (finding no violation of Section 2 when Hispanic voters elect a candidate of choice at-large with 41% of the total population); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 990-91 (1st Cir. 1995), *on remand*, 960 F. Supp. 515 (D. Mass. 1997) (holding that influence districts in which Hispanic voters are 28% of the population are relevant to totality of the circumstances test under Section 2).

If plaintiffs can demonstrate all of the other *Gingles* factors, including the totality of circumstances elements, and they can prove that they have a reasonable and reliable ability to elect a representative of choice in a district that is 49.9% minority in voting age population, the failure to draw such a district and to instead relegate them to districts where they form ineffectual minorities and are unable to elect candidates robs them of an equal opportunity to participate in the electoral process just as surely as it would if they are 50.1% of the voting age population in the illustrative district. The 50% rule appears nowhere in the text or legislative history of the Voting Rights Act, it has been

repudiated under section 5 of the Act, and this Court should act now to make clear that this judicial gloss on the Act cannot be used to dismantle effective minority districts in North Carolina.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANGELA CICCOLO
PAMELA KARLAN
THOMAS GOLDSTEIN

ANITA EARLS
Counsel of Record

DECEMBER 2007

AMICUS CURIAE BRIEF

MOTION FILED
DEC 20 2007

No. 07-689

IN THE

Supreme Court of the United States

GARY BARTLETT, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE HONORABLE VERNON SYKES AND THE HONORABLE ROGER CORBIN

JEFFREY M. WICE
POST OFFICE BOX 42442
WASHINGTON, D.C. 20015
(202) 494-7991

BARBARA E. ETKIND *
JIMMY R. ROCK
MORGAN L. CHINOY
ROSS, DIXON & BELL, LLP
2001 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 662-2000

**Counsel of Record*

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

GARY BARTLETT, ET AL.,

Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,

Respondents.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, The Honorable Vernon Sykes and The Honorable Roger Corbin respectfully move the Court for leave to file the attached brief *amici curiae* in support of the petition. Petitioners have consented to the filing of this brief. Respondents have not, necessitating this motion.

Amicus The Honorable Vernon Sykes is a state legislator representing District Forty-Four in the Ohio House of Representatives.

Amicus The Honorable Roger Corbin is a member and Deputy Presiding Officer of the Nassau County, New York Legislature.

Amici submit their brief in support of the petition because this case may present the best (and perhaps the only) opportunity for the Court to clarify the meaning of Section 2 of the Voting Rights Act before the 2010 Federal Decennial Census. *Amici* are concerned that Voting Rights Act rulings, such as the decision of the Supreme Court of North Carolina at issue here, apply an improper, mechanical approach to the application of Section 2 of the Voting Rights Act. This mechanical approach limits the scope of the Voting Rights Act in ways that are inconsistent with the language and intent of that statute.

In their brief, *amici* seek to present to the Court another aspect of the harm that is caused by rulings that improperly narrow the scope of Section 2 of the Voting Rights Act. Such rulings not only affect the voting rights of minority groups. They also force state and local legislators, like *amici*, to engage in mandatory state redistricting in the presence of conflicting and uncertain case law and may defeat claims that should otherwise fall under the protection of the Voting Rights Act.

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), *amici* respectfully request that the Court grant their motion for leave to file the attached brief *amici curiae* in support of the petition.

Respectfully submitted,

JEFFREY M. WICE
POST OFFICE BOX 42442
WASHINGTON, D.C. 20015
(202) 494-7991

*Counsel of Record

BARBARA E. ETKIND *
JIMMY R. ROCK
MORGAN L. CHINOY
ROSS, DIXON & BELL, LLP
2001 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 662-2000

Counsel for Amici Curiae

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BRIEF AMICI CURIAE OF THE HONORABLE VERNON SYKES AND THE HONORABLE ROGER CORBIN IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amicus The Honorable Vernon Sykes is a state legislator representing District Forty-Four in the Ohio House of Representatives.

Amicus The Honorable Roger Corbin is a member and Deputy Presiding Officer of the Nassau County, New York Legislature.

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* made a financial contribution towards the preparation and submission of the brief.

Voting Rights Act rulings, such as the one at issue here, not only affect the voting rights of minority groups, but also adversely affect state and local legislators, such as *amici*, who are forced to engage in mandatory state redistricting in the presence of conflicting case law and evidence. All of the states will engage in redistricting once again after the 2010 Federal Decennial Census. State and local legislators, such as *amici*, need the benefit of guidance from this Court concerning the correct interpretation of Section 2 of the Voting Rights Act prior to the start of that redistricting process.

SUMMARY OF THE ARGUMENT

The Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6, is intended to ensure that all Americans have an opportunity to participate fully in the democratic process. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court provided a structure for analyzing claims that voting systems, including redistricting plans, violate Section 2 of the Voting Rights Act. *Amici* submit, however, that a number of courts, including the Supreme Court of North Carolina, have interpreted *Gingles* in a manner that undermines the purpose of the statute and may bar meritorious claims of vote dilution. *Amici* respectfully request that the Court grant the petition in order to provide needed guidance concerning the question of whether the first *Gingles* precondition permits Section 2 claims based on coalition districts.[2]

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[2] A district in which a cohesive minority comprises a majority of the voting age population is known as an effective

ARGUMENT

I. The Question Presented Is Of Great Significance Not Only To Minority Groups, But Also To Legislators Responsible For Creating Redistricting Plans That Comply With The Voting Rights Act.

This Court has long recognized that voting is a fundamental right. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). In recognition of this basic right, Congress enacted the Voting Rights Act to provide "essential protections" to voting rights and to encourage "the effort to achieve full participation for all Americans in our democracy...." S. Rep. 97-417, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181. Section 2 of the Voting Rights Act provides, in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

"majority-minority" district. A "coalition" (or "crossover") district, in contrast, is one in which the minority group constitutes less than a numerical majority but can elect its candidate of choice by being consistently joined by a predictably supportive group of voters outside that minority group. An "influence" district is one in which the minority group is not able to elect its candidate of choice, but does have significant influence over election outcomes.

42 U.S.C. § 1973(a). Under this statute, a violation is established where the "totality of circumstances" demonstrates that a political process is "not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A. To Date, The Court Has Left Open The Question Of Whether Section 2 Applies To Claims Where Minority Groups Represent Less Than A Numerical Majority Of A Proposed District.

In *Gingles*, the Court established a three-part test to state a claim that a redistricting plan violates Section 2: (1) the minority population must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population must be "politically cohesive"; and (3) the majority population must "vote[] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."[3] 478 U.S. at 50-51. In so holding, the Court left open the question of whether the first precondition requires a numerical majority of a proposed district, or whether it is sufficient that the minority population

---

[3] Satisfaction of these three preconditions does not settle the matter, but rather the claim is then subject to a "totality of the circumstances" inquiry. *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

be large enough to have a significant impact on elections despite the fact that it is not large enough to control election outcomes without assistance from other groups. *See Gingles*, 478 U.S. at 46 n.12.

Since *Gingles*, the Court has declined to decide whether the first precondition for stating a claim under Section 2 requires a numerical majority. *See League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006) (Kennedy, J., plurality opinion) ("*LULAC*") (assuming, without holding, that it is possible for a minority group to assert a Section 2 claim where it makes up less than 50% of the relevant population); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (assuming, without holding, that even if the minority group were not an absolute majority of the relevant population, the first *Gingles* prong may be satisfied); *Voinovich v. Quilter*, 507 U.S. 146 (1993) (assuming, without deciding, that a cognizable Section 2 claim may be based on crossover or influence districts); *Growe v. Emison*, 507 U.S. 25 (1993) (declining to decide whether a claim that a voting practice or procedure impairs a minority's ability to influence, rather than elect, requires a showing that the minority group constitutes a numerical majority in the relevant geographic area).

In short, in its post-*Gingles* decisions, the Court has been careful to avoid reading *Gingles* as applying Section 2's protections only to majority-minority districts, and thus to date has declined to endorse a mechanical approach to Section 2 claims. *See, e.g.*, *Voinovich*, 507 U.S. at 158 ("the *Gingles* factors cannot be applied mechanically and without

regard to the nature of the claim"). At this time, therefore, there is no clear guidance from the Court as to whether Section 2 protects coalition districts, as well as effective majority-minority districts.

B. Legislators Need Guidance From The Court Regarding The Proper Interpretation Of Section 2 In Advance Of The 2010 Federal Decennial Census.

The vast majority of state constitutions requires that, after each federal decennial census, the legislature (or other authorized body) construct a plan for redistricting state voting districts to adjust for population shifts reflected in each census.[4] Therefore, the states will engage in redistricting state legislatures and other legislative bodies after the 2010 Federal Decennial Census. Absent clear guidance from the Court regarding claims based on potential coalition districts, state

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[4] *See, e.g.*, Ala. Const. art. IX, § 200; Alaska Const. art. VI, § 10; Ark. Const. art. VIII, §§ 2-4; Colo. Const. art. V, § 48; Conn. Const. art. III, § 6; Del. Const. art. II, § 2A; Fla. Const. art. III, § 16; Idaho Const. art. III, § 2; Ill. Const. art. IV, § 3; Ind. Const. art. IV, § 5; Iowa Const. art. III, § 35; Kan. Const. art. 10, § 1; La. Const. art III. § 6; Md. Const. art. III, § 5; Minn. Const. art. IV, § 3; Miss. Const. art XIII, § 254; Mo. Const. art. III. § 2; Mont. Const. art. V, § 14; Neb. Const. art. III-5; Nev. Const. art. IV, § 5; N.H. Const. arts. IX, XXVI; N.C. Const. art. II, §§ 3, 5; N.D. Const. art. IV, § 2; Ohio Const. art. XI, § 1; Okla. Const. § V-11A; Or. Const. art. IV, § 6; Pa. Const. art. II, § 17; R.I. Const. art. VII, § 1, art. VIII, § 1; S.D. Const. art. III, § 5; Tenn. Const. art. II, § 4; Tex. Const. art. III, § 28; Utah Const. art. IX, § 1; Vt. Const. ch. 2, § 73; W. Va. Const. art. VI, § 6-4; Wis. Const. art. IV, § 3; Wyo. Const. art. III, § 47.

legislators will be unable to create redistricting plans that they can be sure comply with the requirements of the Voting Rights Act. The 2010 Federal Decennial Census is approaching rapidly, and the Court may not have another opportunity to clarify *Gingles* before state legislatures will be required to engage in redistricting.

The need for guidance from the Court on this matter is highlighted by the volume of litigation that has been filed after prior redistricting processes. After the 2000 Census, for instance, litigation arose in at least nine states involving questions of whether Section 2 gives rise only to claims based on effective majority-minority districts. *See Johnson-Lee v. City of Minneapolis*, Civil No. 02-1139, 2004 WL 2212044 (D. Minn. Sept. 30, 2004) (expressing a willingness to consider crossover districts, but finding insufficient evidence to satisfy the first *Gingles* element), *aff'd* 170 Fed. Appx. 15 (8th Cir. 2006); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (refusing to recognize influence districts; declining to reject crossover or coalition claims as a matter of law but noting disfavor for them), *aff'd without opinion* 543 U.S. 997 (2004); *Meza v. Galvin*, 322 F. Supp. 2d 52 (D. Mass. 2004) (declining to decide whether to recognize crossover districts where the case could be disposed of based on the "totality of the circumstances" test); *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) (per curiam) (Rhode Island) (refusing to foreclose the possibility that a party might be able to state a Section 2 claim based on a purported influence district); *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (considering

whether to permit Section 2 claims based on influence districts), *aff'd in part, rev'd in part, vacated in part, League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003) (refusing to permit Section 2 claim based on influence, coalition or crossover districts), *cert. denied* 544 U.S. 961 (2005); *Parker v. Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio 2003) (refusing to consider Section 2 claim based on influence district), *aff'd without opinion* 540 U.S. 1013 (2003); *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (refusing to recognize influence districts in the context of a Section 2 claim); *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (rejecting argument that redistricting plan violated Section 2 by creating influence districts rather than effective majority-minority districts), *vacated on other grounds* 248 F.3d 175 (3d Cir. 2001).

The lack of guidance from the Court is compounded by the fact that some redistricting authorities face conflicting direction from the courts in their jurisdictions regarding the permissibility of Section 2 claims based on coalition districts. For instance, New York legislators are faced with conflicting guidance from the Southern District of New York and the Eastern District of New York. *Compare Rodriguez*, 308 F. Supp. 2d at 384 ("The bright-line [numerical majority] rule effectuates the judicial duty to enforce voting rights....") *with Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) ("[T]here is no bright-line rule for discerning

an appropriate [voting age population] level within a district that passes Voting Rights Act muster.").

If the petition is not granted and the issue is left undecided, legislators, such as *amici*, will be forced to face another round of redistricting without sufficient guidance regarding the use of coalition districts, and many of the resulting plans likely will be subject to court challenge. Such litigation both drains government resources and creates significant uncertainty for subsequent elections, particularly if a court were to overturn a state or local redistricting plan. *See, e.g.*, *Page*, 248 F.3d at 195-96 (recognizing the "significant disruption" court action might have on upcoming state legislative elections). These consequences affect not only state legislators, but also court systems that are burdened by lengthy and complex litigation, and citizens of the affected districts, who are left with little certainty that their voting districts will remain intact.

As Justice Souter recognized in his concurring and dissenting opinion in *LULAC*, although the Court has previously "sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50% ... the day has come to answer it." 126 S. Ct. at 2648. State legislators need guidance from the Court before they engage in redistricting after the 2010 Federal Decennial Census. Absent such guidance, state and local legislators face a risk of court challenges to their redistricting plans that have the potential to significantly upset state and local election processes. Therefore, *amici* respectfully submit

that the Court should grant the petition in order to resolve the question of whether the first *Gingles* precondition permits Section 2 claims based on coalition districts.

II. The Petition Also Should Be Granted Because A Number Of Courts That Have Decided This Issue Have Adopted A Mechanical Approach That Is Contrary To The Intent Of The Voting Rights Act And Has Not Been Endorsed By The Court.

Despite the fact that the Court repeatedly has declined to decide whether Section 2 functions mechanically, protecting only effective majority-minority districts, a number of the courts of appeals that have considered this issue have chosen to adopt just such a mechanical approach.

As discussed previously, *Gingles* specifically left open the question of whether to permit Section 2 vote dilution claims involving coalition districts. Despite the Court's recognition that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim," *Voinovich*, 507 U.S. at 158, the Fourth, Fifth, Sixth and Seventh Circuits have taken just such a mechanical approach by requiring that the minority group constitute a numerical majority in the proposed district. *See Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004) ("we agree that *Gingles* establishes a numerical majority requirement for all Section 2 claims"), *cert. denied* 544 U.S. 961 (2005); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) ("we reject the

appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population"), *cert. denied* 528 U.S. 1114 (2000); *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (rejecting Section 2 claim based on coalition of minority groups where an individual group lacked sufficient members to state a claim alone); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) (refusing to allow a Section 2 claim that a system impairs a minority group's ability to influence elections), *cert. denied* 490 U.S. 1031 (1989). By favoring the expediency of a mechanical approach, these courts have ignored the intent of the Voting Rights Act.

Two other circuits, the Ninth and Eleventh, have declined to apply such a mechanical approach, and instead have reserved judgment on the issue, as has this Court. *See Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004) ("We leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e. a claim where 'members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to *elect* representatives of their choice with support from a limited but reliable white crossover vote.'") (emphasis in original); *Romero v. City of Pomona*, 883 F.2d 1418, 1427 n.15 (9th Cir. 1989) ("we express no opinion as to whether section 2's protections extend to a *coalition* of racial or language minorities"), *overruled in part on other grounds by Townsend v Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990).

In contrast, the New Jersey Supreme Court has determined that claims based on influence districts are permitted under Section 2. *See McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003). Relying significantly upon the Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), under Section 5 of the Voting Rights Act, the New Jersey Supreme Court found that allowing such claims was consistent with the intent of the Voting Rights Act. *McNeil*, 828 A.2d at 853. The court further noted that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in eliminating discrimination against minority voters.'" *Id.* (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

Because courts have reached conflicting conclusions on this issue, and many of those courts have taken an approach that is directly contrary to the intent of the Voting Rights Act, the Court should grant the petition and provide needed guidance on the correct interpretation of the first *Gingles* precondition.

III. The Petition Should Be Granted To Clarify That Section 2 Of The Voting Rights Act Protects Coalition Districts.

A mechanical approach of numerical majority finds no support in the language of the Voting Rights Act and is inconsistent with the intent of that statute. Rather, it imposes an arbitrary dividing line that excludes claims that otherwise may present valid instances of vote dilution.

A. The Plain Language Of Section 2 Provides No Support For A Strict Requirement Of Numerical Majority.

The language of the Voting Rights Act requires an evaluation of the "totality of circumstances" to determine whether a violation has occurred:

> A violation of subsection (a) of this section is established if, based on *the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (emphasis added). Although the preconditions set forth by the Court in *Gingles*, properly applied, may screen out meritless claims of vote dilution, as discussed above, when improperly applied, they also may bar entirely meritorious claims. Moreover, a determination that these preconditions include a mechanical requirement of numerical majority would be inconsistent with the plain language of the statute. Section 2's "totality of circumstances" analysis becomes meaningless if the *Gingles* preconditions

are used as rigid checkboxes for establishing a vote dilution claim.

B. The Legislative History Of The Voting Rights Act Makes Clear That Section 2 Was Not Intended To Impose A Rigid Requirement Of Numerical Majority.

In developing the preconditions for a Section 2 claim, *Gingles* relied heavily upon statements in the Senate Judiciary Committee Majority Report accompanying the 1982 amendments to the Voting Rights Act. As noted by *Gingles*, the Senate Report stated:

> To establish a violation [of Section 2], plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.
>
> Typical factors include:
>
> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. 97-417, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report went on to list certain other factors that might have

probative value in establishing a violation, including whether elected officials have demonstrated a significant lack of responsiveness to the needs of the minority group, and whether the policy underlying the challenged voting qualification, prerequisite, standard, practice or procedure is tenuous. *Id.* at 207. The Senate Report further noted that "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." *Id.*

Significantly, none of these factors requires that the minority group comprise a numerical majority in order to state a Section 2 vote dilution claim. Nor does the Senate Report endorse such a requirement at any other point. To the contrary, the variety of factors to be considered, along with the Senate Report's statement that "the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *id.*, illustrates that Congress intended Section 2 to be a flexible remedy guided by the "totality of circumstances," rather than by a mechanical checklist. Requiring that a minority group comprise a numerical majority in the proposed district thus would violate the intent of the statute.

C. Adopting A Mechanical Approach Of Requiring A Numerical Majority Would Defeat Claims Even Where It Is Recognized That Minority Populations Of Less Than 50% Have An Opportunity To Elect Their Chosen Officials.

As Justice O'Connor recognized in her concurring opinion in *Gingles*, "when the candidates preferred by a minority group are elected [ ], the minority group has *elected* those candidates, even if white support was indispensable to these victories." *Gingles*, 478 U.S. at 90 n.1. In this case, the Supreme Court of North Carolina recognized that "[p]ast election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates." *Pender County v. Bartlett*, 649 S.E.2d 364, 367 (N.C. 2007) (Pet. App. at 5a). This recognition highlights the arbitrary nature of the approach adopted by the Supreme Court of North Carolina. That mechanical approach forecloses Section 2 claims even in instances where a minority voting population of less than 50% creates an opportunity to *elect* the minority group's preferred candidate. *See also* J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 563-68 (1993) (illustrating how minority groups representing less than 50% of a district's population may be able to elect candidates

of their choice, whereas minority groups representing more than 50% of a district's population may not be able to do so depending on the level of cohesiveness of the minority and majority groups).

Simply put, the mechanical approach that requires a district to contain a numerical majority runs contrary to the evidence available to legislators regarding the impact of minority voters in coalition districts. That approach also requires legislators to create redistricting plans based on arbitrary criteria. *Amici* respectfully request the Court to grant the petition and clarify that the first *Gingles* precondition does not bar Section 2 claims based on coalition districts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY M. WICE
POST OFFICE BOX 42442
WASHINGTON, D.C.
20015
(202) 494-7991

*Counsel of Record

BARBARA E. ETKIND *
JIMMY R. ROCK
MORGAN L. CHINOY
ROSS, DIXON & BELL, LLP
2001 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 662-2000

Counsel for Amici Curiae

DECEMBER 20, 2007

JOINT APPENDIX

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No. 07-689

Supreme Court, U.S.
FILED
JUN 10 2008
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In The
Supreme Court of the United States

GARY BARTLETT, ET AL.,

Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

JOINT APPENDIX

CHRISTOPHER G. BROWNING, JR.*
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900
cbrowning@ncdoj.gov

CARL W. THURMAN, III*
LAW OFFICES OF CARL W. THURMAN, III
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979
Cwtiii@aol.com

*Counsel of Record

[Additional Counsel listed on inside front cover]

PETITION FOR CERTIORARI FILED NOVEMBER 21, 2007
CERTIORARI GRANTED MARCH 17, 2008

ROY COOPER
Attorney General
State of North Carolina
CHRISTOPHER G.
BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioners

CARL W. THURMAN, III*
LAW OFFICES OF CARL
W. THURMAN, III
3169 Wrightsville
Avenue
Wilmington, NC 28403
(910) 620-3979

Attorney for Respondents

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NOTICE

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5. Plaintiffs' Memorandum in Support of Motion for Preliminary and Permanent Injunction 06/11/04

6. Affidavit of Carl Thurman III 06/11/04

7. Affidavit of Frances Pinion 06/11/04

8. Notice of Hearing on Motion for Preliminary and Motion for Summary Judgment on Permanent Injunction 06/11/04

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    1. Tables: Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan
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    3. Map & Statistics: Remedial 14 Amendment House Plan (*Stephenson* Plaintiffs' Alternative 2003 House Plan)
    4. Map & Statistics: VRA Review 01 House Plan (*Stephenson* Plaintiffs' Alternative 2003 House Plan)

23. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment 03/07/05

24. Affidavit of Stephen Holland (03/07/05) 03/07/05

25. Plaintiffs' Memorandum of Additional Authority 04/04/05

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28. Memorandum of Decision and Order re: Summary Judgment 12/02/05

29. Notice of Appeal 12/30/05

30. Joint Stipulations of the Parties 01/09/06

31. Memorandum of Decision and Judgment 01/09/06

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33. Record on Appeal 02/24/06

34. Plaintiff-Appellants' Brief 04/03/06

35. Defendant-Appellees' Brief 05/08/06

36. Motion for Leave to File as *Amici Curiae* in Support of Defendants Brief of Cindy Moore, Milford Farrior and Mary Jordan as *Amici Curiae* in Support of Appellees 05/08/06

37. Defendant-Appellees' Memorandum of Additional Authority 07/14/06

38. Oral Argument 09/13/06

39. Opinion 08/24/07

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE	SUPERIOR COURT DIVISION 04 CVS 6966
PENDER COUNTY, DWIGHT STRICKLAND, Individually and as a Pender County Commissioner, DAVID WILLIAMS, Individually and as a Pender County Commissioner, F.D. RIVENBARK, Individually and as a Pender County Commissioner, STEPHEN HOLLAND, Individually and as a Pender County Commissioner, and EUGENE MEADOWS, Individually and as a Pender County Commissioner PLAINTIFFS, v. GARY BARTLETT, as Executive Director of the State Board of Elections;	COMPLAINT (REDISTRICTING) (G.S. §§ 1/81.1, 1-267-1) (THREE JUDGE PANEL)

LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE in Their Official Capacities as Members Of the North Carolina Board of Elections; JAMES B. BLACK in His Official Capacity as Co-Speaker of the North Carolina House of Representatives; RICHARD T. MORGAN, in His Official Capacity as Co-Speaker of the North Carolina House of Representatives; MARC BASNIGHT, in His Official Capacity as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, in His Official Capacity as Governor of the State of North Carolina; ROY COOPER, in His Official Capacity as Attorney General of the State of North Carolina;

DEFENDANTS

COME NOW PLAINTIFFS, Complaining of Defendants, and say and allege as follows:

1. Pender County is a political subdivision of the State of North Carolina governed by a Board of Commissioners.
2. Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Meadows are duly elected members of the Pender County Board of Commissioners and are residents and registered voters of Pender County.
3. Pender County brings this action on behalf of its citizens who are being disenfranchised by the unconstitutional splitting of Pender County citizens among two North Carolina House Districts.
4. Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Meadows bring this action in their official capacities as Pender County Commissioners and in their individual capacities as citizens and registered voters in Pender County on their own behalf and on behalf of all other so situated.
5. Defendant Defendant Gary Bartlett is being sued in his official capacity as the Executive Director of the State Board of Elections, in which he is charged with administering the election laws of the State of North Carolina. The State Board of

Elections is an agency of the State of North Carolina with its headquarters in Wake County.

6. Defendants Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree are current members of the State Board of Elections and are being sued in their official capacity as members of the State Board of Elections. The State Board of Elections is charged with administering the election laws of the State of North Carolina and canvassing and determining the results of elections to the General Assembly for legislative districts, including NC House Districts 16 and 18.
7. Defendant James B. Black is being sued in his official capacity as Representative for the 100th District of the North Carolina House of Representatives under the redistricting plan implemented by Judge Jenkins in 2002 and Co-Speaker of the North Carolina House of Representatives.
8. Defendant Richard T. Morgan is being sued in his official capacity as Representative for the 52nd District of the North Carolina House of Representatives under the redistricting plan implemented by Judge Jenkins in 2002 and Co-Speaker of the North Carolina House of Representatives.
9. Defendant Marc Basnight is being sued in his official capacity as Senator for the 1st District of

the North Carolina Senate under the redistricting plan implemented by Judge Jenkins in 2002 and as President Pro Tempore of North Carolina Senate.

10. Defendants Roy Cooper and Michael Easley are being sued in their official capacity as the Attorney General and Governor for the State of North Carolina.
11. Prior to the 2002 session of the General Assembly, Pender County last had a representative in the General Assembly in the 1960's.
12. In the redistricting plan adopted by the North Carolina General Assembly in 1992, Pender County was split among 5 North Carolina House districts, and 2 North Carolina Senate Districts.
13. In the redistricting plan adopted by the North Carolina General Assembly in 2001, Pender County was split among 5 North Carolina House districts, and 3 North Carolina Senate Districts.
14. As a result of the opinion in Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002)(Stephenson I), another redistricting plan was drawn by the North Carolina General Assembly in 2002 ("2002 Plan") which placed Pender County in a single NC House and single NC Senate district.
15. The second plan drawn by the North Carolina General Assembly was ruled improper and an alternative plan imposed by Superior Court Judge

Knox Jenkins on 2003. The plan drawn by Judge Jenkins also placed Pender County in a single NC House and single NC Senate district.

16. In Stephenson v. Bartlett, 357 N.C. 301, 582 S.E.2d 247 (2003) (Stephenson II) , the North Carolina Supreme Court ruled the 2002 Plan invalid and directed that the North Carolina General Assembly draw new legislative districts.
17. On November 25, 2003 the North Carolina General Assembly adopted new legislative districts ("2003 Plan").
18. The 2003 Plan received approval under Section 5 of the Voting Rights Act of 1965 from the United States Attorney General on March 30, 2004.
19. On April 22, 2004, the North Carolina Supreme Court ruled that the Stephenson case was concluded and that any redistricting lawsuit challenging the 2003 Plan must be filed under a separate caption and heard before a three judge panel.
20. The 2003 Plan places Pender County in a single Senate district, and no challenge is being made to the North Carolina Senate redistricting plan.
21. The 2003 Plan divides Pender County among two NC House districts, the 16th and 18th.
22. The division of Pender County into two North Carolina House Districts violates Article II, Section 5(3) of the North Carolina Constitution.

23. For purposes of the current redistricting, population figures from the 2000 census must be used.
24. Pender County's population in the 2000 census is 41,082.
25. Under the holdings in Stephenson I and II, a NC House District may not deviate from the ideal population total by more than 5% in either direction.
26. Pender County's population equates to 61% of the ideal population for a NC House district.
27. In providing guidance to the North Carolina General Assembly in drawing legislative districts, the North Carolina Supreme Court in Stephenson I & II provided that County's which were not within 5%, plus or minus, should be clustered together to form multi county clusters from which legislative districts were to be drawn.
28. The 2003 Plan combines Pender County and New Hanover County into a two county cluster for creating NC House Districts.
29. The combined population of the two counties represents 300% of an ideal House district.
30. Accordingly, the two County cluster must be divided into 3 House districts.
31. Two entire House districts could be drawn within the borders of New Hanover County.
32. By drawing two House districts entirely within New Hanover County, the third district would

keep Pender County whole within a single House district.

33. The 2003 Plan needlessly splits Pender County between two House districts in violation of Article II, Section 5(3) of the North Carolina Constitution and the holdings in Stephenson I & II.
34. Defendants, Black, Morgan and Basnight, as the leaders of the North Carolina General Assembly, had a duty to draw NC House districts which complied with the North Carolina Constitution and the holdings in Stephenson I & II.
35. Despite the clear failure of the 2003 Plan to with the North Carolina Constitution and the holdings in Stephenson I & II, Defendants Bartlett, Leake, Cordle, Sims, Shinn, and Winfree have established primary, runoff and general election dates which purport to use the 2003 Plan for the 16th and 18th NC House Districts.
36. Despite their obligation to protect and defend the North Carolina Constitution, Defendants Easley and Cooper have taken no action to stop the implementation of the unconstitutional 2003 Plan, and specifically to prevent the citizens of Pender County from having their votes diluted and their Constitutional rights denied.
37. The rights of the citizens of Pender County under the North Carolina Constitution have been violated by the division of Pender County among two House districts in the 2003 Plan.

38. The citizens of Pender County will be irreparably harmed if the unconstitutional 2003 Plan denying to them their rights under the North Carolina Constitution is permitted to go forward.
39. There is no adequate remedy other than injunctive relief to protect the rights of the citizens of Pender County.
40. The violation of the North Carolina Constitution, so long as the two County cluster with New Hanover County is maintained, may only be corrected by redrawing the NC House districts such that Pender County is kept within a single district.
41. The citizens of Pender County are too numerous to make joinder of all effected citizens practical.
42. The denial of the protection of Article II, Section 5(3) of the North Carolina Constitution is common to all the citizens of Pender County.
43. The named Plaintiffs will fairly and adequately represent the interests of Pender County.

WHEREFORE, Plaintiffs respectfully pray unto the Court:

1. That the Court enter an Order finding that the 16th and 18th NC House districts as drawn in the 2003 Plan violate Article II, Section 5(3) of the North Carolina Constitution;

2. That the Court enter a mandatory and prohibitory injunction prohibiting the implementation of the current 16th and 18th NC House districts for the 2004 elections;
3. That, pursuant to N.C.G.S. §120-2.4, the Court allow the North Carolina General Assembly two weeks from the date of the entry of its Injunctive Order to draw House Districts which comply with the North Carolina Constitution;
4. That should the General Assembly fail to adopt such districts within the time allowed, that the Court enter an Order setting interim districts for use in the 2004 elections;
5. That the Court certify this matter as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure;
6. That all costs of this action be taxed to the Defendants, in their official capacities; and
7. That the Court grant to Plaintiffs such other and further relief as it deems just and proper.

This the 14th day of May, 2004

/s/ Carl W. Thurman, III
CARL W. THURMAN III
Pender County Attorney
3169 Wrightsville Ave.
Wilmington, North Carolina 28403
910-763-7487
Attorney for Plaintiffs

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

ANSWER

NOW COME defendants, by and through their undersigned counsel, and hereby answer the Complaint as follows:

1. Pender County is a political subdivision of the State of North Carolina governed by a Board of Commissioners.

ANSWER: Admitted.

2. Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Meadows are duly elected members of the Pender County Board of Commissioners and are residents and registered voters of Pender County.

ANSWER: Admitted.

3. Pender County brings this action on behalf of its citizens who are being disenfranchised by the unconstitutional splitting of Pender County citizens among two North Carolina House Districts.

ANSWER: Admitted that Pender County purports to bring this action on behalf of its citizens. The remaining allegations of ¶ 3 are denied, and it is specifically denied that Pender County or its Board of

County Commissioners may properly prosecute this action, that plaintiffs may maintain this action as a class action, that any citizen of Pender County has been or is being disenfranchised, and that the placement of Pender County in two House Districts violates the North Carolina Constitution.

4. Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Meadows bring this action in their official capacities as Pender County Commissioners and in their individual capacities as citizens and registered voters in Pender County on their own behalf and on behalf of all other so situated.

ANSWER: Admitted that plaintiffs Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Meadows purport to bring this action in the capacities that they allege. Any remaining allegations of ¶ 4 are denied, and it is specifically denied that these plaintiffs may properly prosecute this action in their official capacities and that they may maintain this action as a class action.

5. Defendant Gary Bartlett is being sued in his official capacity as the Executive Director of the State Board of Elections, in which he is charged with administering the election laws of the State of North Carolina. The State Board of Elections is an agency of the State of North Carolina with its headquarters in Wake County.

ANSWER: Admitted that Gary Bartlett is being sued in his official capacity as the Executive Director of the State Board of Elections, in which capacity he has those duties and responsibilities set forth by statute and those delegated to him by the State Board of Elections. It is further admitted that the State Board of Elections is an agency of the State of North Carolina with its headquarters in Wake County. Any remaining allegations of ¶ 5, including any inferences to be drawn therefrom, are denied.

6. Defendants Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree are current members of the State Board of Elections and are being sued in their official capacity as members of the State Board of Elections. The State Board of Elections is charged with administering the election laws of the State of North Carolina and canvassing and determining the results of elections to the General Assembly for legislative districts, including NC House Districts 16 and 18.

ANSWER: Admitted that Defendants Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree are current members of the State Board of Elections and are being sued as alleged. Further admitted that the State Board of Elections is charged with general supervision over primaries and elections in the State of North Carolina and canvassing and determining the results of elections to the General Assembly for legislative districts in which

the district lies in more than one county, including North Carolina House Districts 16 and 18. Any remaining allegations of ¶ 6, including any inference to be drawn therefrom, are denied, and it is specifically denied that the State Board of Elections has primary authority for actually conducting primaries and elections, which primary authority is vested in the various county boards of elections.

7. Defendant James B. Black is being sued in his official capacity as Representative for the 100th District of the North Carolina House of Representatives under the redistricting plan implemented by Judge Jenkins in 2002 and Co-Speaker of the North Carolina House of Representatives.

ANSWER: Admitted that Defendant James B. Black is being sued as alleged. Any remaining allegations of ¶ 7 are denied, and it is specifically denied that Defendant James B. Black is a proper party to this action in either his official or his individual capacity.

8. Defendant Richard T. Morgan is being sued in his official capacity as Representative for the 52nd District of the North Carolina House of Representatives under the redistricting plan implemented by Judge Jenkins in 2002 and Co-Speaker of the North Carolina House of Representatives.

ANSWER: Admitted that Defendant Richard T. Morgan is being sued as alleged. Any remaining allegations of ¶ 8 are denied, and it is specifically

denied that Defendant Richard T. Morgan is a proper party to this action in either his official or his individual capacity.

9. Defendant Marc Basnight is being sued in his official capacity as Senator for the 1st District of the North Carolina Senate under the redistricting plan implemented by Judge Jenkins in 2002 and as President Pro Tempore of North Carolina Senate.

ANSWER: Admitted that Defendant Marc Basnight is being sued as alleged. Any remaining allegations of ¶ 9 are denied, and it is specifically denied that Defendant Marc Basnight is a proper party to this action in either his official or his individual capacity.

10. Defendants Roy Cooper and Michael Easley are being sued in their official capacity as the Attorney General and Governor for the State of North Carolina.

ANSWER: Admitted that Defendants Roy Cooper and Michael Easley are being sued as alleged. Any remaining allegations of ¶ 10 are denied, and it is specifically denied that Defendants Roy Cooper and Michael Easley are proper parties to this action in either their official or their individual capacities.

11. Prior to the 2002 session of the General Assembly, Pender County last had a representative in the General Assembly in the 1960's.

ANSWER: Denied. The citizens of Pender County have been represented in the General Assembly in every session of the General Assembly since the county's formation. Upon information and belief, it is

admitted that prior to the 2002 Session of the General Assembly, a resident of Pender County last served in the General Assembly in the 1960's, but it is specifically denied that either Pender County or its citizens have a right to be represented in the North Carolina General Assembly solely by a resident of Pender County.

12. In the redistricting plan adopted by the North Carolina General Assembly in 1992, Pender County was split among 5 North Carolina House districts, and 2 North Carolina Senate Districts.

ANSWER: Denied.

13. In the redistricting plan adopted by the North Carolina General Assembly in 2001, Pender County was split among 5 North Carolina House districts, and 3 North Carolina Senate Districts.

ANSWER: Admitted.

14. As a result of the opinion in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), another redistricting plan was drawn by the North Carolina General Assembly in 2002 ("2002 Plan") which placed Pender County in a single NC House and single NC Senate district.

ANSWER: Admitted.

15. The second plan drawn by the North Carolina General Assembly was ruled improper and an alternative plan imposed by Superior Court Judge Knox Jenkins on 2003. The plan drawn by Judge

Jenkins also placed Pender County in a single NC House and single NC Senate district.

ANSWER: Admitted that the House and Senate districting plans drawn by the General Assembly in 2002 in response to the Supreme Court's decision in *Stephenson I* were found to be unconstitutional. It is further admitted that the Interim Plans imposed by Senior Resident Superior Court Judge Knox V. Jenkins, Jr., for the 2002 legislative elections placed Pender County in one House district and one Senate district. Any remaining allegations of ¶ 15 are denied.

16. In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), the North Carolina Supreme Court ruled the 2002 Plan invalid and directed that the North Carolina General Assembly draw new legislative districts.

ANSWER: Admitted that the decision in *Stephenson II* speaks for itself regarding the plan enacted by the General Assembly in 2002. Any remaining allegations of ¶ 16 are denied.

17. On November 25, 2003 the North Carolina General Assembly adopted new legislative districts ("2003 Plan").

ANSWER: Admitted.

18. The 2003 Plan received approval under Section 5 of the Voting Rights Act of 1965 from the United States Attorney General on March 30, 2004.

ANSWER: Admitted that the United States Attorney General, pursuant to Section 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. § 1973c (hereinafter "the Voting Rights Act"), gave administrative preclearance to the 2003 Plan on March 30, 2004. Any remaining allegations of ¶ 18 are denied.

19. On April 22, 2004, the North Carolina Supreme Court ruled that the *Stephenson* case was concluded and that any redistricting lawsuit challenging the 2003 Plan must be filed under a separate caption and heard before a three judge panel.

ANSWER: Admitted that the decision in *Stephenson v. Bartlett and Morgan v. Stephenson*, 358 N.C. 219, 595 S.E.2d 112 (2004), speaks for itself. Any remaining allegations of ¶ 19 are denied.

20. The 2003 Plan places Pender County in a single Senate district, and no challenge is being made to the North Carolina Senate redistricting plan.

ANSWER: Admitted.

21. The 2003 Plan divides Pender County among two NC House districts, the 16th and 18th.

ANSWER: Admitted.

22. The division of Pender County into two North Carolina House Districts violates Article II, Section 5(3) of the North Carolina Constitution.

ANSWER: Denied.

23. For purposes of the current redistricting, population figures from the 2000 census must be used.

ANSWER: Admitted that the Public Law 97-171 2000 Decennial Census data, which is included in the

General Assembly's DistrictBuilder redistricting system, is the correct population data base for drafting redistricting plans until the next decennial census.

24. Pender County's population in the 2000 census is 41,082.

ANSWER: Admitted that according to the 2000 Decennial Census and the data used in the General Assembly's DistrictBuilder system, the total population of Pender County is 41,082.

25. Under the holdings in *Stephenson I* and *II*, a NC House District may not deviate from the ideal population total by more than 5% in either direction.

ANSWER: Admitted that under the federal and North Carolina constitutions, as interpreted by the North Carolina Supreme Court in *Stephenson I* and *II*, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal one person, one vote requirements. Any remaining allegations of ¶ 25 are denied.

26. Pender County's population equates to 61% of the ideal population for a NC House district.

ANSWER: Admitted that Pender County's total population deviates from the ideal population for a single-member House district (67,078) by 38.75%. Any remaining allegations of ¶ 26 are denied.

27. In providing guidance to the North Carolina General Assembly in drawing legislative districts, the North Carolina Supreme Court in *Stephenson I & II*

provided that Counties which were not within 5%, plus or minus, should be clustered together to form multi county clusters from which legislative districts were to be drawn.

ANSWER: Admitted that the decisions in *Stephenson I* and *II* speak for themselves. Any remaining allegations of ¶ 27 are denied.

28. The 2003 Plan combines Pender County and New Hanover County into a two county cluster for creating NC House Districts.

ANSWER: Admitted that the 2003 Plan combines Pender County and New Hanover County into a two-county grouping for the purpose of creating House districts.

29. The combined population of the two counties represents 300% of an ideal House district.

ANSWER: Admitted that the combined total population of Pender and New Hanover Counties is 201,389, which is sufficient to encompass three single-member House districts that are at or within plus or minus five percent of the ideal population for a single-member House district. Any remaining allegations of ¶ 29 are denied.

30. Accordingly, the two County cluster must be divided into 3 House districts.

ANSWER: Admitted that the total population of this two-county grouping is sufficient to create three single-member House districts. Any remaining allegations of ¶ 30 are denied.

31. Two entire House districts could be drawn within the borders of New Hanover County.

ANSWER: Admitted that if the requirements of Section 2 of the Voting Rights Act and the supremacy clauses of the federal and North Carolina constitutions are ignored, the total population of New Hanover County is sufficient to create two single-member House districts wholly within the borders of the county. Any remaining allegations of ¶ 31, including any inferences to be drawn therefrom, are denied.

32. By drawing two House districts entirely within New Hanover County, the third district would keep Pender County whole within a single House district.

ANSWER: Admitted that if the requirements of Section 2 of the Voting Rights Act and the supremacy clauses of the federal and North Carolina constitutions are ignored such that two entire single-member House districts were drawn entirely within the borders of New Hanover County, a third single-member district could be drawn that includes all of Pender County and a portion of New Hanover County. Any remaining allegations of ¶ 32, including any inferences to be drawn therefrom, are denied.

33. The 2003 Plan needlessly splits Pender County between two House districts in violation of Article II, Section 5(3) of the North Carolina Constitution and the holdings in *Stephenson I* & *II*.

ANSWER: Denied.

34. Defendants, Black, Morgan and Basnight, as the leaders of the North Carolina General Assembly, had a duty to draw NC House districts which complied with the North Carolina Constitution and the holdings in *Stephenson I & II*.

ANSWER: Admitted that any legislative redistricting plan enacted by the North Carolina General Assembly must comply with the North Carolina Constitution and with the decisions in *Stephenson I* and *II*. Any remaining allegations of ¶ 34, including any inferences to be drawn therefrom, are denied, and it is specifically denied that defendants Black, Morgan and Basnight are proper defendants in this action in either their official or their individual capacities or that they did not comply with any duty they owed as legislators.

35. Despite the clear failure of the 2003 Plan to with the North Carolina Constitution and the holdings in *Stephenson I & II*, Defendants Bartlett, Leake, Cordle, Sims, Shinn, and Winfree have established primary, runoff and general election dates which purport to use the 2003 Plan for the 16th and 18th NC House Districts.

ANSWER: Admitted that the State Board of Elections has established dates for primary, second primary and general legislative elections, all of which are to be conducted using the 2003 House Plan and are to be conducted by the various county boards of elections, including the Pender County Board of

Elections and the New Hanover County Board of Elections. Any remaining allegations of ¶ 35, including any inferences to be drawn therefrom, are denied, and it is specifically denied that the 2003 House Plan is unconstitutional or fails to comply with *Stephenson I* or *II* or that the State Board of Elections or any of its employees or members has any authority to refuse to execute State election laws duly enacted by the General Assembly, which are presumed to be constitutional.

36. Despite their obligation to protect and defend the North Carolina Constitution, Defendants Easley and Cooper have taken no action to stop the implementation of the unconstitutional 2003 Plan, and specifically to prevent the citizens of Pender County from having their votes diluted and their Constitutional rights denied.

ANSWER: Denied, and it is specifically denied that the constitutional and statutory duties of the Governor or the Attorney General, including the duty to support, maintain and defend the Constitution of North Carolina, not inconsistent with the Constitution of the United States, confers upon them any authority to stop the implementation of the duly enacted 2003 House Plan, which enactment is presumed by law to be constitutional. It is further specifically denied that defendants Easley and Cooper are proper parties to this action in either their official or their individual capacities, that the vote of any citizen of Pender

County has been or will be diluted, and that the 2003 House Plan denies any citizen of Pender County his or her constitutional rights.

37. The rights of the citizens of Pender County under the North Carolina Constitution have been violated by the division of Pender County among two House districts in the 2003 Plan.

ANSWER: Denied.

38. The citizens of Pender County will be irreparably harmed if the unconstitutional 2003 Plan denying to them their rights under the North Carolina Constitution is permitted to go forward.

ANSWER: Denied.

39. There is no adequate remedy other than injunctive relief to protect the rights of the citizens of Pender County.

ANSWER: Denied, and it is specifically denied that plaintiffs have stated any claim for relief that would entitle to them to a remedy of any sort.

40. The violation of the North Carolina Constitution, so long as the two County cluster with New Hanover County is maintained, may only be corrected by redrawing the NC House districts such that Pender County is kept within a single district.

ANSWER: Denied, and it is specifically denied that the division of Pender County between two House districts in the 2003 House Plan violates the North Carolina Constitution.

41. The citizens of Pender County are too numerous to make joinder of all effected citizens practical.

ANSWER: Admitted that, if this were a proper class action, the citizens of Pender County would be too numerous to make joinder of all citizens practical. Any remaining allegations of ¶ 41, including any inferences to be drawn therefrom, are denied, and it is specifically denied that all of the citizens of Pender County have a common or aligned interest in this litigation or that this action can properly be maintained as a class action.

42. The denial of the protection of Article II, Section 5(3) of the North Carolina Constitution is common to all the citizens of Pender County.

ANSWER: Denied, and it is specifically denied that Article II, Section 5(3), of the North Carolina Constitution creates any protections or rights for individual citizens, that any citizen of Pender County has been denied any alleged protection under Article II, Section 5(3), of the North Carolina Constitution, and that all of the citizens of Pender County have a common or aligned interest in this litigation.

43. The named Plaintiffs will fairly and adequately represent the interests of Pender County.

ANSWER: Denied.

FURTHER DEFENSES

1. Neither Pender County, as a part of State government created by and subject to the full control of the General Assembly, nor its commissioners acting in their official capacity have the authority to maintain this action challenging the constitutionality of an act of the General Assembly.

2. Defendants Black, Morgan, Basnight, Easley and Cooper are not proper parties to this action, either in their official or their individual capacities.

3. To the extent that plaintiffs may seek injunctive relief in this action, then New Hanover County, in which portions of House Districts 16 and 18 are located, and which would be required to bear the costs associated with the delay of the 2004 elections sought by plaintiffs, or its board of commissioners may be necessary parties to this action, and plaintiffs have failed to join these potentially necessary parties.

4. To the extent that plaintiffs seek injunctive relief with regard to the 2004 primaries and election, plaintiffs' claims are barred by laches.

5. To the extent that plaintiffs seek injunctive relief with regard to the 2004 primaries and election, plaintiffs' are estopped from seeking such relief.

6. Plaintiffs have failed to state a claim for which relief can be granted because the division of Pender County between two House districts was required by federal law – *i.e.*, Section 2 of the Voting Rights Act –

the supremacy of which under the federal and State constitutions was specifically recognized by the North Carolina Supreme Court in *Stephenson I* and *II*.

WHEREFORE, defendants respectfully pray that the Court:

1. Deny plaintiffs all relief sought by them;
2. Enter judgment for defendants; and
3. Award such other relief to defendants as the Court may deem just and proper.

Respectfully submitted, this the 4th day of June, 2004.

ROY COOPER
ATTORNEY GENERAL

By: /s/Tiare B. Smiley
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654

Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for the Defendants

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF CARL THURMAN III

CARL W. THURMAN III, being first duly sworn, deposes and says as follows:

1. I am above the age of 18 years, and am competent to testify as to the matters set forth herein, which are based upon my personal knowledge and belief. I am the County Attorney for Pender County and have served in that capacity for over six years.

2. In March 2002, I filed an amicus brief in the Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377(2002) (Stephenson I) case. The North Carolina Supreme Court recognized Pender County's plight in the opinion in Stephenson I and even quoted from the amicus brief in its opinion.

3. In both the 2002 House plan adopted by the North Carolina General Assembly and the Interim plan adopted by Judge Knox Jenkins, Pender County was placed into a single House district.

4. In the 2002 election, a Pender County resident was elected to the North Carolina House for the first time since the 1960's.

5. On July 16, 2003, the North Carolina Supreme Court ruled in Stephenson v. Bartlett, 357 N.C. 301, 582 S.E.2d 247(2003) (Stephenson II) that the 2002 redistricting plan adopted by the General Assembly was invalid.

6. In November of 2003, the Pender County Board of Commissioners learned that legislative leaders were considering enacting a plan which would split Pender County among two House districts. Accordingly, they directed that I appear to speak before the chairmen of the respective House and Senate committees on redistricting.

7. On November 20, 2003, I spoke before the chairmen of the committees. Because the proposed new plans had not been released to the public, my comments necessarily had to be somewhat general in nature. The committees on redistricting never held public hearings on the proposed plans, nor for that matter did the full committees meet on the plan prior to presentation of the plans to the General Assembly.

8. Attached hereto are possible legislative districts which have been drawn using the "DistrictBuilder" software system. The data used was, according to Rachel Suelflow of the Legislative Staff, the same as that available for use by the General Assembly.

9. The "DistrictBuilder" contains partial election results for the 2000 and 2002 elections. Included in

those partial results are the election results for Justice Henry Frye's race for the North Carolina Supreme Court in 2000, Auditor Ralph Campbell's race for auditor in 2000, and Justice G.K. Butterfield's race for the Supreme Court in 2002. Justice Frye, Mr. Campbell and Justice Butterfield are African-American, or in the terms of the census racial classification, Black.

10. Attached hereto are true and correct copies of pages from the North Carolina General Assembly's "Legislator's Guide to North Carolina Legislative and Congressional Redistricting" (Fourth Edition) which show data on the population changes between the 1990 and 2000 census.

FURTHER AFFIANT SAYETH NOT

This the 11th day of June, 2004.

/s/Carl W. Thurman III
Carl W. Thurman III

[notarial attestation omitted in printing]

[Pertinent data in omitted attachments is set out at pages 56, 58, 60, 62 and 80-83 of the Joint Appendix.]

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

NOTICE OF FILING

Defendants' respectfully file the following affidavits, attached hereto, in support of DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT:

A. Affidavit of Representative Martha B. Alexander
B. Affidavit of Representative Thomas E. Wright
C. Affidavit of William R. Gilkeson, Jr.
D. Affidavit of Gary O. Bartlett
E. Affidavit of Frances Pinion
F. Affidavit of Renee Lane Chesnut
G. Affidavit of Milford Farrior
H. Affidavit of Cindy Moore

Respectfully submitted, this the 21st day of June, 2004.

ROY COOPER
Attorney General

/s/Tiare B. Smiley
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654

Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for the Defendants

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF REPRESENTATIVE MARTHA B. ALEXANDER

Representative Martha B. Alexander, being first sworn, deposes and says:

1. I am the duly elected Representative from House District 106 in Mecklenburg County and am serving my sixth term in the North Carolina House of Representatives. I was first elected in November, 1992 and began serving in 1993. I am a registered Democrat.

2. I was appointed by the Co-Speakers of the North Carolina House to serve as Co-Chair of the House Legislative Redistricting Committee on February 25, 2003. The Republican Co-Chair appointed at that same time was Representative Rick L. Eddins from Wake County.

3. Prior to the Special Session in November, 2003, when the 2003 House Plan was enacted, all black Representatives were consulted about the effect of the *Stephenson I* and *II* opinions and the redrawing of their legislative districts. This consultation was part of my effort to assure that the plan complied with the

Voting Rights Act ("VRA"). Because all of the House minority members are Democrats, they each met separately with Speaker James B. Black and/or me to discuss their districts. Although the boundaries of some minority districts were established with a single redistricting meeting in which we looked at a proposed map of each district and the proposed district's demographics and election history, typically several meetings were held as the boundaries of the districts were discussed and modified in a back-and-forth process. This process continued until most Representatives were reasonably satisfied and it was felt the individual districts and map as a whole met the requirements of state and federal law. I worked closely with the Legislative Black Caucus leadership and members to draw districts that reasonably maintain the opportunity of racial minorities to effectively exercise their right to vote and to elect representatives of their choice.

4. In drawing minority districts, compromises had to be struck in order to comply with §§ 2 and 5 of the Voting Rights Act and also the Whole County Provisions ("WCP") of the North Carolina Constitution as interpreted by the Supreme Court of North Carolina in the *Stephenson* opinions. The Court's opinions require a redistricting plan to comply with the VRA and that the VRA districts comply with the whole

county provisions "to the maximum extent practicable."

5. The 2003 House Plan includes ten majority - black total population ("BPOP") districts and one majority-Native American total population ("NAPOP") districts in counties covered by § 5 of the VRA. There are also two House districts with over 40% BPOP in § 5 counties. This plan received § 5 preclearance by the United States Department of Justice on March 30, 2004.

6. The 2003 House Plan also includes four majority-black (BPOP) and four over 40% BPOP House districts in areas of the state not covered by § 5, but subject to § 2 of the VRA. Among these districts is House District 18, which was drawn in Pender and New Hanover Counties in order to maintain the district as an effective black VRA district.

7. Past election results in North Carolina demonstrate that House districts with a BPOP of 41.54% and above or a black voting age population ("BVAP") of 38.37% and above can provide an effective opportunity for the election of black candidates. See Attachment A. An important indicator of effective black voting strength we considered when drawing districts was the percentage of registered Democrats who are black. In past elections, districts with black Democratic registration as low as 52.58% in District 18

and as high as 78.87% in District 60 have elected black Representatives. See Attachment B.

8. The ability of black voters to elect black candidates has also been shown to exist in congressional districts with less than a 50% BVAP. In 1998, under a plan drawn to satisfy the ruling of the three-judge federal court in *Cromartie* - - a judgment subsequently reversed by the United States Supreme Court - - the black population in District 1 was reduced to 50.27% BPOP and 43.54% BVAP, and in District 12 was reduced to 35.58% BPOP and 32.56% BVAP. Both black incumbents were re-elected. In the 2000 election, held under the legislature's 1997 Congressional Plan, black incumbents were again re-elected in District 1 (50.27% BPOP, 46.54% BVAP) and District 12 (46.67% BPOP, and 43.36% BVAP). In the new districts drawn after the 2000 Census, black incumbents continued to run successfully in the 2002 elections in District 1 (50.71% BPOP, 47.82% BVAP) and District 12 (45.02% BPOP, 45.56% BVAP).

9. In the trial court's 2002 Interim Plan, House District 18 was maintained as an effective black district with a BPOP of 47.52%, BVAP of 43.52% and 52.58% black Democratic registration. Representative Thomas E. Wright was re-elected under the Interim Plan. He has served six terms in the House of Representatives and was first elected to the House in the 1992 election, the same year I won my first

election. However, the district as drawn by the court divided the three counties of New Hanover, Brunswick and Columbus and required a four-county group consisting of Pender, New Hanover, Brunswick and Columbus Counties. The state courts considered a similar configuration in the legislatively drawn 2002 Plan to be non-compact.

10. In drawing the 2003 House Plan, it was possible to maintain an effective black district by keeping District 18 in a two-county group consisting of New Hanover and Pender Counties. This also allowed grouping Columbus and Brunswick Counties, thereby creating two additional two-county groups in place of a four-county group. The number of county splits and county line traverses was also reduced in the 2003 Plan as the district now divides only two counties and has one traverse. The black population, though somewhat reduced, remains at 42.89% BPOP, 39.36% BVAP, and 53.72% black registered Democrats, which past experience has shown is sufficient in North Carolina to provide an effective black voting district.

11. We found it was not possible to draw District 18 wholly within New Hanover County and to maintain an effective black voting district. If the district is drawn wholly within New Hanover, the BPOP drops below 36%, the BVAP below 32%, and black Democratic registration below 49%. To illustrate, see the two attached maps created drawing

District 18 wholly within New Hanover County. One plan (Attachment C) splits no precincts, while the other plan (Attachment D) splits precincts to raise the black population percentages as high as possible. These percentages are below the levels that have in the past successfully provided black citizens in North Carolina an opportunity to elect their candidates of choice.

12. All of the statistics mentioned in this affidavit are available on the General Assembly's DistrictBuilder computer redistricting system.

13. In my discussions with the Legislative Black Caucus leadership and Representative Wright, it was clear that there were very strong feelings about the importance of maintaining District 18 as an effective black voting district. There was a serious concern about the possibility of a § 2 VRA challenge to the plan. Representative Wright, like every other legislator, would have preferred to keep the configuration of his district at that time unchanged. He was concerned about the black voters in Brunswick and Columbus Counties who had supported him in all of his elections since 1992. Although no portion of Pender County was included in the court-drawn Interim Plan under which the 2002 elections were held, Representative Wright had represented a portion of Pender County (former District 98) from his first

election in 1992 until the 2002 election. Representative Wright did vote for the 2003 Plan.

14. Based on the information available to me and other legislators, it was felt that we had an obligation to find a way to maintain an effective black voting district in the area in order to comply with the Voting Rights Act, but we also needed to adjust the district as much as possible to comply with the WCP requirements set out by the Court. As Co-Chair of the House Legislative Redistricting Committee, I think the 2003 Plan constitutes the best possible compromise between the requirements of the Voting Rights Act and the Court's instructions regarding the WCP in its *Stephenson* opinions.

This the 9 day of June, 2004.

/s/Martha B. Alexander
Representative Martha B. Alexander

[notarial attestation omitted in printing]

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of Representative Martha B. Alexander,
Attachment A

BLACK POPULATION PERCENTAGES

* Shading indicates Districts with a history of electing Black Representatives

** Population percentages based on 2000 Decennial Census

1992 House Plan				Interim House Plan			
Total Black Pop		Black Voting Age Pop		Total Black Pop		Black Voting Age Pop	
Dist	% Black	Dist	% Black	Dist	% Black	Dist	% Black
8	58.56%	8	55.61%	8	55.16%	8	52.03%
				27	53.44%	27	51.15%
78	55.40%	78	52.94%				
				102	50.29%		
						102	46.05%
58	43.60%						
		58	38.98%				
6	40.55%	6	36.75%				

Pender County v. Bartlett, No. 04 CVS 6966.
Affidavit of Representative Martha B. Alexander.
Attachment A

1992 House Plan				Interim House Plan			
Total Black Pop		Black Voting Age Pop		Total Black Pop		Black Voting Age Pop	
Dist	%Black	Dist	%Black	Dist	% Black	Dist	% Black
71	33.78%	71	31.76%	38	45.61%		
56	33.76%	18	30.71%			38	41.16%
36	33.65%	36	30.51%	6	33.81%	6	31.20%
18	33.65%	56	30.12%	100	33.35%	100	30.18%
33	31.73%	33	29.70%	23	31.96%	23	29.84%
22	31.08%	22	29.68%	106	29.53%	65	28.06%
32	30.97%	32	28.41%	22	29.39%	32	27.84%
2	29.12%	2	27.24%	99	29.36%	22	27.70%
11	28.78%	11	26.80%	11	29.23%	99	27.42%
89	28.72%	1	26.45%	4	29.15%	4	27.26%
1	27.62%	89	26.40%	32	29.06%	11	27.18%
72	27.54%	12	26.02%	44	28.88%	63	27.18%
12	27.48%	54	25.70%	65	28.64%	1	26.99%
35	27.45%	35	25.05%	63	28.59%	49	26.75%
54	27.32%	72	24.74%	69	28.20%	44	26.74%
64	27.09%	16	23.95%	49	28.07%	69	26.64%
16	25.83%	64	23.73%	1	28.00%	106	26.16%
9	25.49%	9	23.06%	30	27.98%	30	25.47%
96	23.45%	77	21.96%	41	27.10%	41	25.28%
77	23.31%	96	21.75%	25	26.26%	25	25.05%
25	23.31%	25	21.66%	77	26.16%	77	24.10%
65	22.91%	65	21.09%	46	25.52%	46	23.95%
75	22.75%	75	20.90%	55	24.17%	55	23.20%
44	22.58%	19	20.05%	45	24.06%	45	22.34%
19	21.85%	44	19.72%	68	23.75%	68	21.94%
86	21.40%	86	19.52%	111	23.50%	14	21.57%

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of Representative Martha B. Alexander,
Attachment A

1992 House Plan				Interim House Plan			
Total Black Pop		Black Voting Age Pop		Total Black Pop		Black Voting Age Pop	
Dist	%Black	Dist	%Black	Dist	% Black	Dist	% Black
42	19.91%	10	17.76%	14	23.48%	10	21.21%
80	19.06%	80	17.66%	9	22.61%	111	21.19%
10	18.90%	42	17.04%	10	22.59%	9	20.43%
34	18.68%	34	16.69%	109	22.30%	109	19.54%
20	17.89%	20	16.42%	2	20.58%	2	19.08%
15	17.63%	15	16.28%	70	19.87%	51	17.74%
90	17.62%	90	16.02%	20	19.61%	59	17.66%
3	17.49%	3	15.94%	53	19.21%	70	17.61%
37	17.23%	37	15.71%	51	18.86%	16	17.46%
48	16.37%	85	14.64%	59	18.83%	20	17.43%
31	15.97%	48	14.64%	96	18.83%	40	17.38%
95	15.33%	95	14.32%	39	18.81%	53	17.34%
73	15.32%	73	14.29%	16	18.59%	96	17.22%
85	15.25%	31	14.12%	40	18.47%	39	17.17%
4	15.14%	63	13.91%	62	17.24%	62	16.39%
63	14.78%	24	13.67%	81	16.54%	81	15.32%
24	14.47%	4	13.64%	52	15.95%	54	14.92%
76	14.00%	76	12.61%	3	15.60%	15	14.58%
14	13.89%	14	12.14%	15	15.59%	3	14.29%
61	11.92%	61	10.87%	54	15.35%	28	14.22%
92	11.42%	92	10.64%	28	15.01%	52	14.11%
30	11.36%	30	10.58%	26	14.72%	47	14.05%
39	11.20%	29	10.41%	47	14.55%	26	13.38%
93	11.06%	62	10.22%	61	13.69%	37	13.34%
29	11.02%	93	10.06%	66	13.69%	66	12.89%
62	10.45%	39	9.66%	37	13.68%	61	12.50%

Pender County v. Bartlett, No. 04 CVS 6966.
Affidavit of Representative Martha B. Alexander.
Attachment A

1992 House Plan				Interim House Plan			
Total Black Pop		Black Voting Age Pop		Total Black Pop		Black Voting Age Pop	
Dist	%Black	Dist	%Black	Dist	% Black	Dist	% Black
55	10.11%	47	9.04%	112	13.04%	112	11.91%
27	9.83%	69	8.95%	75	12.32%	34	11.41%
69	9.80%	55	8.81%	34	12.17%	75	11.40%
82	9.56%	82	8.78%	74	12.04%	74	11.24%
47	9.40%	84	8.69%	114	11.92%	56	10.86%
84	9.34%	27	8.69%	110	11.66%	110	10.71%
57	8.87%	88	8.17%	56	11.57%	114	10.43%
88	8.80%	57	8.09%	93	10.63%	93	9.33%
43	8.12%	43	7.53%	88	10.38%	88	9.23%
51	8.11%	51	7.18%	98	9.66%	98	9.02%
13	7.76%	13	6.60%	64	8.63%	86	8.38%
45	6.80%	45	6.11%	17	8.58%	64	8.20%
46	6.33%	46	5.53%	35	8.57%	35	8.06%
68	6.28%	83	5.47%	86	8.54%	57	8.02%
83	5.88%	38	5.35%	94	8.52%	94	7.84%
38	5.80%	68	5.31%	67	8.43%	115	7.78%
81	5.56%	74	5.23%	57	8.38%	67	7.77%
74	5.45%	81	5.16%	115	8.34%	103	7.72%
91	5.38%	91	4.85%	103	8.29%	17	7.54%
94	4.41%	41	4.09%	95	7.72%	95	7.18%
41	4.33%	94	4.04%	89	7.36%	50	7.04%
49	3.32%	49	3.30%	50	7.07%	89	6.83%
40	3.27%	40	3.05%	13	6.63%	13	6.03%
50	1.74%	50	1.44%	97	6.44%	97	5.91%
52	1.42%	52	1.41%	108	6.23%	108	5.89%
53	1.38%	53	1.14%	73	5.73%	73	5.43%

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of Representative Martha B. Alexander,
Attachment A

1992 House Plan				Interim House Plan			
Total Black Pop		Black Voting Age Pop		Total Black Pop		Black Voting Age Pop	
Dist	% Black	Dist	% Black	Dist	% Black	Dist	% Black
				105	5.66%	76	5.21%
				104	5.66%	105	5.17%
				76	5.51%	104	5.09%
				19	5.49%	19	5.07%
				79	5.09%	79	5.00%
				84	4.88%	36	4.80%
				91	4.85%	91	4.74%
				36	4.81%	84	4.70%
				92	4.61%	92	4.50%
				87	4.20%	83	4.02%
				83	4.16%	87	3.91%
				117	3.85%	80	3.55%
				80	3.78%	117	3.44%
				113	3.50%	90	3.15%
				90	3.33%	85	3.11%
				85	2.99%	113	3.07%
				78	2.90%	78	2.91%
				116	1.97%	116	1.77%
				82	1.26%	119	1.32%
				119	1.25%	82	1.28%
				118	1.23%	118	1.23%
				120	1.19%	120	1.05%

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BLACK DEMOCRATIC VOTER REGISTRATION

* Shading indicates Districts with a history of electing Black Representatives

** Population percentages based on 2003 registration data

1992 HOUSE PLAN	
Dist.	% Black
8	66.22%
78	61.28%
58	57.20%
54	53.25%
56	49.89%

INTERIM HOUSE PLAN	
Dist.	% Black
102	67.77%
38	63.97%
8	61.20%
27	60.03%
99	58.48%

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1992 HOUSE PLAN	
Dist.	% Black
36	49.89%
6	47.90%
18	47.17%
12	45.06%
35	43.75%
89	43.75%
11	41.59%
71	40.79%
33	40.44%
2	38.15%
22	38.05%
1	37.55%
65	37.47%
32	37.32%
25	35.78%
72	35.25%
64	35.18%
9	35.12%
75	34.53%
90	33.63%
96	33.41%
15	32.95%
31	32.43%
34	32.24%
10	31.51%
77	31.34%
44	31.01%

INTERIM HOUSE PLAN	
Dist.	% Black
100	50.59%
44	47.69%
14	45.11%
106	44.83%
11	44.54%
63	43.56%
77	42.97%
6	42.61%
23	42.33%
65	41.90%
22	41.34%
69	38.57%
1	38.26%
4	37.60%
49	37.47%
41	36.87%
45	36.29%
32	36.11%
25	36.07%
9	35.05%
62	34.87%
16	34.30%
39	33.89%
10	33.32%
30	33.25%

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1992 HOUSE PLAN	
Dist.	**% Black**
19	30.87%
42	30.59%
16	30.49%
37	28.50%
80	28.45%
3	28.00%
20	27.43%
86	27.27%
76	26.42%
63	26.03%
95	25.27%
30	25.14%
73	24.02%
69	23.51%
14	23.46%
48	23.36%
92	23.20%
4	22.93%
29	20.90%
62	20.63%
84	19.93%
24	19.41%
27	19.38%
88	19.38%
93	19.36%
55	18.24%
38	17.93%

INTERIM HOUSE PLAN	
Dist.	**% Black**
52	33.18%
111	32.73%
70	32.64%
68	32.37%
55	32.08%
109	32.06%
40	31.88%
96	30.87%
53	29.88%
46	29.83%
81	28.87%
59	28.34%
3	28.22%
51	28.13%
37	27.07%
20	27.02%
2	26.49%
74	26.31%
28	25.83%
61	25.38%
98	25.26%
26	25.26%
75	24.31%
15	23.77%
66	22.77%
54	22.63%
103	21.93%

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1992 HOUSE PLAN	
Dist.	**% Black**
57	17.46%
43	16.33%
82	16.22%
39	16.02%
61	15.22%
74	14.34%
47	13.99%
85	13.49%
45	13.40%
46	13.36%
81	12.93%
13	12.76%
83	11.54%
91	11.45%
51	10.84%
94	10.77%
41	9.49%
68	9.29%
40	5.43%
49	4.41%
50	3.66%
52	1.55%
53	1.48%

INTERIM HOUSE PLAN	
Dist.	**% Black**
110	21.63%
88	21.18%
67	20.21%
93	19.08%
94	18.76%
112	18.74%
34	18.18%
57	17.53%
56	16.11%
50	15.89%
95	15.82%
64	15.55%
114	15.23%
89	15.21%
17	14.70%
73	14.55%
105	13.80%
79	13.72%
47	13.49%
35	13.41%
86	13.34%
92	12.11%
115	12.08%
108	12.06%
84	11.74%
97	11.59%
104	11.41%

Pender County v. Bartlett, No. 04 CVS 6966,
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1992 HOUSE PLAN	
Dist.	**% Black**

INTERIM HOUSE PLAN	
Dist.	**% Black**
76	10.85%
36	10.65%
91	10.48%
13	10.47%
19	9.63%
83	9.58%
80	9.31%
87	8.84%
113	7.69%
117	7.64%
78	7.31%
85	5.04%
90	4.94%
116	2.47%
82	2.16%
118	1.54%
119	1.49%
120	1.40%

Pender County v. Bartlett, No. 04 CVS 6966,
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Attachment C

District Statistics		
Plan: Whole Precincts - District 18		
Ideal Population :	**67,078**	
Actual Population :	**64,379**	
Difference :	**-2,699**	
% Difference	**-4.02%**	
Total Population	64,379	100.00%
White (single race)	39,647	61.58%
Black (single race)	22,393	34.78%
Black (total)	22,763	35.36%
Native American (single race)	301	0.47%
Asian/Pacific Islander (single race)	459	0.71%
Other (single race)	750	1.16%
Multi Race	829	1.29%
Hispanic	1,769	2.75%
Non-Hispanic	62,610	97.25%
Voting Age Total Population	49,860	100.00%
White (single race)	32,782	65.75%
Black (single race)	15,478	31.04%
Black (total)	15,612	31.31%
Native American (single race)	239	0.48%
Voter Registration Total	41,831	100.00%
White	29,134	69.65%
Black	11,946	28.56%
Native American	92	0.22%
Other Race/Undesignated Race	659	1.58%
All Democrats	21,222	50.73%

Whole Precincts / 2003 Database / 06/08/04/12:26 PM

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District Statistics		
Plan: Whole Precincts - District 18		
All Republicans	12,102	28.93%
All Libertarians	223	0.53%
All Unaffiliated	8,284	19.80%
Black Democrats	10,214	48.13%
00 Governor Dem - Easley	13,025	66.88%
00 Governor Rep - Vinroot	5,925	30.43%
00 Chief Justice Dem - Frye	11,089	59.40%
00 Chief Justice Rep - Lake	7,578	40.60%
00 State Auditor Dem - Campbell	11,237	61.69%
00 State Auditor Rep - Merritt	6,978	38.31%
02 NC Supreme Court Dem - Butterfield	8,268	59.32%
02 NC Supreme Court Rep - Brady	5,671	40.68%
02 US Senate Dem - Bowles	8,600	57.06%
02 US Senate Rep - Dole	6,199	41.13%

Pender County v. Bartlett, No. 04 CVS 6966,
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Attachment C

District Statistics		
Plan: Whole Precincts - District 16		
Ideal Population :	**67,078**	
Actual Population :	**67,443**	
Difference :	**365**	
% Difference	**0.54%**	
Total Population	67,443	100.00%
White (single race)	54,550	80.88%
Black (single race)	10,798	16.01%
Black (total)	10,985	16.29%
Native American (single race)	287	0.43%
Asian/Pacific Islander (single race)	288	0.43%
Other (single race)	929	1.38%
Multi Race	591	0.88%
Hispanic	1,837	2.72%
Non-Hispanic	65,606	97.28%
Voting Age Total Population	52,909	100.00%
White (single race)	43,595	82.40%
Black (single race)	7,930	14.99%
Black (total)	7,905	14.94%
Native American (single race)	205	0.39%
Voter Registration Total	46,131	100.00%
White	39,307	85.21%
Black	6,235	13.52%
Native American	58	0.13%
Other Race/Undesignated Race	531	1.15%
All Democrats	20,106	43.58%
All Republicans	17,930	38.87%

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District Statistics		
Plan: Whole Precincts - District 16		
All Libertarians	143	0.31%
All Unaffiliated	7,952	17.24%
Black Democrats	5,621	27.96%
00 Governor Dem - Easley	13,095	53.04%
00 Governor Rep - Vinroot	11,162	45.21%
00 Chief Justice Dem - Frye	10,201	43.47%
00 Chief Justice Rep - Lake	13,264	56.53%
00 State Auditor Dem - Campbell	10,733	47.01%
00 State Auditor Rep - Merritt	12,096	52.99%
02 NC Supreme Court Dem - Butterfield	8,310	43.70%
02 NC Supreme Court Rep - Brady	10,706	56.30%
02 US Senate Dem - Bowles	8,632	41.58%
02 US Senate Rep - Dole	11,815	56.92%

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District Statistics		
Plan: Whole Precincts - District 19		
Ideal Population :	**67,078**	
Actual Population :	**69,567**	
Difference :	**2,489**	
% Difference	**3.71%**	
Total Population	69,567	100.00%
White (single race)	63,783	91.69%
Black (single race)	3,701	5.32%
Black (total)	3,882	5.58%
Native American (single race)	240	0.34%
Asian/Pacific Islander (single race)	770	1.11%
Other (single race)	421	0.61%
Multi Race	652	0.94%
Hispanic	1,166	1.68%
Non-Hispanic	68,401	98.32%
Voting Age Total Population	55,501	100.00%
White (single race)	51,394	92.60%
Black (single race)	2,659	4.79%
Black (total)	2,731	4.92%
Native American (single race)	194	0.35%
Voter Registration Total	51,819	100.00%
White	48,912	94.39%
Black	2,016	3.89%
Native American	99	0.19%
Other Race/ Undesignated Race	792	1.53%
All Democrats	18,165	35.05%

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District Statistics		
Plan: Whole Precincts - District 19		
All Republicans	22,308	43.05%
All Libertarians	204	0.39%
All Unaffiliated	11,142	21.50%
Black Democrats	1,655	9.11%
00 Governor Dem - Easley	14,057	52.49%
00 Governor Rep - Vinroot	12,118	45.25%
00 Chief Justice Dem - Frye	10,042	39.77%
00 Chief Justice Rep - Lake	15,207	60.23%
00 State Auditor Dem - Campbell	10,643	43.43%
00 State Auditor Rep - Merritt	13,862	56.57%
02 NC Supreme Court Dem - Butterfield	8,041	39.96%
02 NC Supreme Court Rep - Brady	12,080	60.04%
02 US Senate Dem - Bowles	8,607	38.43%
02 US Senate Rep - Dole	13,428	59.96%

[map in original Attachment C omitted in printing]

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 18		
Ideal Population :	**67,078**	
Actual Population :	**63,744**	
Difference :	**-3,334**	
% Difference	**-4.97%**	
Total Population	63,744	100.00%
White (single race)	38,799	60.87%
Black (single race)	22,597	35.45%
Black (total)	22,968	36.03%
Native American (single race)	295	0.46%
Asian/Pacific Islander (single race)	451	0.71%
Other (single race)	759	1.19%
Multi Race	843	1.32%
Hispanic	1,795	2.82%
Non-Hispanic	61,949	97.18%
Voting Age Total Population	49,345	100.00%
White (single race)	32,108	65.07%
Black (single race) -	15,624	31.66%
Black (total)	15,762	31.94%
Native American (single race)	239	0.48%
Voter Registration Total	41,440	100.00%
White	28,871	69.67%
Black	11,845	28.58%
Native American	86	0.21%
Other Race/Undesignated Race	638	1.54%
All Democrats	21,036	50.76%
All Republicans	11,993	28.94%

Split Precincts / 2003 Database / 06/08/04/ 12:34 PM

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 18		
All Libertarians	215	0.52%
All Unaffiliated	8,196	19.78%
Black Democrats	10,133	48.17%
00 Governor Dem - Easley	12,903	66.79%
00 Governor Rep - Vinroot	5,899	30.54%
00 Chief Justice Dem - Frye	10,992	59.36%
00 Chief Justice Rep - Lake	7,525	40.64%
00 State Auditor Dem - Campbell	11,138	61.62%
00 State Auditor Rep - Merritt	6,936	38.38%
02 NC Supreme Court Dem - Butterfield	8,199	59.27%
02 NC Supreme Court Rep - Brady	5,634	40.73%
02 US Senate Dem - Bowles	8,527	57.01%
02 US Senate Rep - Dole	6,162	41.20%

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 16		
Ideal Population :	**67,078**	
Actual Population :	**67,886**	
Difference :	**808**	
% Difference	**1.20%**	
Total Population	67,886	100.00%
White (single race)	55,066	81.12%
Black (single race)	10,708	15.77%
Black (total)	10,896	16.05%
Native American (single race)	291	0.43%
Asian/Pacific Islander (single race)	294	0.43%
Other (single race)	934	1.38%
Multi Race	593	0.87%
Hispanic	1,842	2.71%
Non-Hispanic	66,044	97.29%
Voting Age Total Population	53,224	100.00%
White (single race)	43,964	82.60%
Black (single race)	7,867	14.78%
Black (total)	7,942	14.92%
Native American (single race)	206	0.39%
Voter Registration Total	46,392	100.00%
White	39,493	85.13%
Black	6,302	13.58%
Native American	58	0.13%
Other Race/ Undesignated Race	539	1.16%
All Democrats	20,211	43.57%

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 16		
All Republicans	18,028	38.86%
All Libertarians	144	0.31%
All Unaffiliated	8,009	17.26%
Black Democrats	5,677	28.09%
00 Governor Dem - Easley	13,162	53.10%
00 Governor Rep - Vinroot	11,188	45.14%
00 Chief Justice Dem - Frye	10,255	43.53%
00 Chief Justice Rep - Lake	13,303	56.47%
00 State Auditor Dem - Campbell	10,787	47.07%
00 State Auditor Rep - Merritt	12,130	52.93%
02 NC Supreme Court Dem - Butterfield	8,352	43.74%
02 NC Supreme Court Rep - Brady	10,741	56.26%
02 US Senate Dem - Bowles	8,678	41.64%
02 US Senate Rep - Dole	11,849	56.86%

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 19		
Ideal Population :	**67,078**	
Actual Population :	**69,759**	
Difference :	**2,681**	
% Difference	**4.00%**	
Total Population	69,759	100.00%
White (single race)	64,115	91.91%
Black (single race)	3,587	5.14%
Black (total)	3,766	5.40%
Native American (single race)	242	0.35%
Asian/Pacific Islander (single race)	772	1.11%
Other (single race)	407	0.58%
Multi Race	636	0.91%
Hispanic	1,135	1.63%
Non-Hispanic	68,624	98.37%
Voting Age Total Population	55,701	100.00%
White (single race)	51,699	92.82%
Black (single race)	2,576	4.62%
Black (total)	2,644	4.75%
Native American (single race)	193	0.35%
Voter Registration Total	51,949	100.00%
White	48,989	94.30%
Black	2,050	3.95%
Native American	105	0.20%
Other Race/ Undesignated Race	805	1.54%
All Democrats	18,246	35.12%

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DISTRICT STATISTICS		
PLAN: SPLIT PRECINCTS - DISTRICT 19		
All Republicans	22,319	42.96%
All Libertarians	211	0.41%
All Unaffiliated	11,173	21.51%
Black Democrats	1,680	9.21%
00 Governor Dem - Easley	14,112	52.58%
00 Governor Rep - Vinroot	12,118	45.15%
00 Chief Justice Dem - Frye	10,085	39.85%
00 Chief Justice Rep - Lake	15,221	60.15%
00 State Auditor Dem - Campbell	10,688	43.52%
00 State Auditor Rep - Merritt	13,870	56.48%
02 NC Supreme Court Dem - Butterfield	8,068	40.04%
02 NC Supreme Court Rep - Brady	12,082	59.96%
02 US Senate Dem - Bowles	8,634	38.49%
02 US Senate Rep - Dole	13,431	59.88%

[map in original Attachment D omitted in printing]

Split Precincts / 2003 Database / 06/08/04/ 12:34 PM

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF THOMAS E. WRIGHT

Representative Thomas E. Wright, being first sworn, deposes and says:

1. I am the duly elected Representative from House District 18 in New Hanover and Pender Counties. I am a registered Democrat. I was born, raised and educated in Wilmington and am serving my sixth term in the North Carolina House of Representatives. At the current time I am a Chairman of the House Appropriations Committee and a member of the House Health, Insurance, Public Utilities and Transportation Committees.

2. As I have gained seniority in my years in the legislature, I have served in leadership roles of increasing significance in the House. In 1999, I was Chairman of the House Appropriations Subcommittee on Capital and several other House Committees. I was also Chairman of the Legislative Black Caucus for the 1999-2000 term. A list of my committee assignments from 1993 to the present is attached as Attachment A. I have also served on numerous boards, committees and commissions, including the Joint Legislative

Commission on Governmental Operations on which I have served continuously since 1999. Other committees of particular note on which I serve are the Cancer Coordination and Control Advisory Committee (since 1994); the Committee on Employee Hospital and Medical Benefits (since 1999); and the Minority Health Advisory Council (since 1993). A list of my appointments from 1993 to the present is attached as Attachment B.

3. I was first elected to the North Carolina House in 1992 from House District 98, which was drawn by the legislature in the 1992 Plan to create a majority-minority district in the southeastern corner of the State. District 98 was created after the United States Department of Justice raised objections during their § 5 Voting Rights Act review of the 1991 House Plan based on the legislature's failure to draw single-member districts with minority populations sufficient to enable minority voters in the southeastern counties to elect candidates of their choice despite requests made at hearings and committees meetings for additional minority districts in this area. District 98 in the 1992 Plan included portions of Columbus, Brunswick, New Hanover and Pender Counties.

4. I am now serving my sixth term in the North Carolina House, having won elections in District 98 in 1992, 1994, 1996, 1998 and 2000. I was also re-elected in 2002 after the district was redrawn by the trial

court as District 18 in the Interim Plan. The Interim Plan drew District 18 along the northern portions of Columbus, Brunswick and New Hanover Counties, but did not extend the district into Pender County. My personal experience with politics in the southeastern counties and New Hanover area has convinced me that it is necessary to maintain an effective minority district if black voters are to have the opportunity to elect their candidate of choice. I would never have had the opportunity in the first place to serve as a member of the North Carolina General Assembly and to demonstrate to the voters my ability to serve all the citizens in the area if the United States Department of Justice had not required that District 98 be created after the 1990 Decennial Census.

5. In the 1992 Plan based on the 1990 Decennial Census, District 98 was majority-black with a total black population ("BPOP") of 59.26% and a black voting age population ("BVAP") of 55.72%. Based on the 2000 Decennial Census, the district's BPOP was 50.70%, the BVAP was 47.07%, and the black Democratic voter registration ("BDR") was 53.37%. That district was drawn so that it stretched across four counties. I am aware that with recent federal and state court decisions the General Assembly has been required to draw districts to include fewer counties and to make the boundaries more regular in shape. The 2002 Sutton 5 House Plan drew the new District

18 so it included portions of Columbus, Brunswick and New Hanover counties. It had a BPOP of 44.59%, BVAP of 40.73% and BDR of 51.35%. The Interim Plan drawn by the court was similar in shape and geography, although it raised the black population percentages slightly to a BPOP of 47.52%, BVAP of 43.72%, and BDR of 52.58%. I understand the courts considered the configuration of District 18 in the 2002 Plan, which crossed three counties, to be non-compact. In the 2003 Plan, District 18 has a BPOP of 42.89%, BVAP of 39.36% and BDR of 53.72%.

6. When the General Assembly was required to redraw its legislative districts in 2003, I had several discussions with Speaker James Black and Representative Martha Alexander, the Democratic Co-Chair of the House Legislative Redistricting Committee, about preserving an effective minority district for the black voters in and around the New Hanover County area. I was concerned that the percentage of minorities in the district would drop to a point where the black voters in the area would no longer be able to elect their candidate of choice. I am especially concerned that minorities in Columbus and Brunswick Counties feel disenfranchised by the 2003 Plan in which the effectiveness of their vote and their influence has been diminished. As an incumbent, I have always worked hard to cultivate multi-racial and bi-partisan relationships and to serve all the citizens

in the area regardless of their race, so my concern is not so much for my own election chances but for whoever will come after me. It is important for the black citizens in the southeastern corner of the State around my home county of New Hanover to have a fair opportunity to elect a candidate of their choice to serve them in the General Assembly.

7. Because I was re-elected by the voters of Columbus and Brunswick Counties to serve six terms in the House, it is difficult for me to see District 18 drawn so it no longer includes portions of these counties in the 2003 Plan. I am of course delighted to have the opportunity to again represent voters from Pender County which is included in District 18 in the 2003 Plan. The reasons expressed to me for drawing District 18 solely within Pender and New Hanover Counties were to achieve greater compliance with the requirements of the *Stephenson* opinion, while at the same time attempting to maintain an effective minority district for black voters.

8. The demographic trends I see in the southeastern area of the State where I have run all my campaigns include a decreasing minority population and an increasing Republican and unaffiliated voter registration. For this reason Democratic and Republican races are very competitive. These trends make it increasingly important for me to continue my

efforts to seek multi-racial and bi-partisan support from the voters.

9. I have never considered statewide election data in analyzing my district. Re-aggregations of statewide general election data - - such as the 2000 Justice Henry Frye and State Auditor Ralph Campbell elections, and the 2002 Justice G. K. Butterfield election - - are not good predictors of elections at the local level, such as a House district. That data comes from low profile races and tends to reflect partisan trends based on straight ticket voting. The total black population, black voting age population and black democratic voter registration of a legislative district must all be at levels that allow minorities to have an equal opportunity to elect minority candidates of choice.

10. Because of demographic trends and voting patterns, there is currently no minority serving on the current New Hanover Board of County Commissioners (which is elected at large) or the Pender Board of County Commissioners (in which members reside in districts but are elected at large). In the past, one minority, Jonathan Barfield, Sr., a black Democrat, won election to the New Hanover Board. He served three terms and left office in 1992. In Pender County several black Democrats served on the Board at different times until 2000, when Cleveland Simpson resigned to take a job in the Department of Commerce

and his appointed successor, James Faison, Jr., lost in the 2000 election.

11. Based on my knowledge of New Hanover County and various maps I have seen, it is not possible to draw a House district that keeps Pender County whole or that is wholly within New Hanover County which will have a minority population sufficient to allow minority voters to elect their candidate of choice. The best map for minorities offered by Carl Thurman, III, which keeps Pender County whole and reaches into New Hanover County and Wilmington, joins the heart of my district with Representative Carolyn Justice's district and is significantly lower than the 2003 Plan in BPOP (38.77 vs. 42.89) and BVAP (35.33 vs. 39.36). It is slightly lower in BDR (52.76 vs. 53.72). That plan also would pit the incumbent white Republican against the incumbent black Democrat. The black population numbers in District 18 as now drawn show that the black democratic registration numbers for the district in the 2003 Plan can be meaningfully improved before the election with voter registration efforts. For this reason District 18 in the 2003 Plan provides an equal opportunity for black voters to elect their candidate of choice in the primary and general election, while Thurman's proposal would appear to significantly reduce my chances for re-election even as an incumbent and clearly creates a barrier for any other black candidate to compete

successfully. Because an effective minority district can be drawn by dividing one or more counties in the area, I believe that the legislature is required by the Voting Rights Act to continue to draw a district which contains a black population sufficient to provide an equal opportunity for black voters to elect a Representative of their choice.

12. During the 2003 redistricting process, the Legislative Black Caucus consulted independently with experienced voting rights attorneys regarding the proposed 2003 plan. The Caucus wanted to assure that the plan fully complied with §§ 2 and 5 of the Voting Rights Act in order to provide an equal opportunity to black voters to effectively exercise their right to vote. Although there were concerns about several of the minority districts in the plan, including District 18, the Caucus did decide to support the 2003 Plan, primarily because it appeared to satisfy all technical legal requirements and overall appeared to be in the best interests of minority voters statewide. With two or three exceptions, all of the black Representatives voted for the 2003 Plan when it came up for vote on the House floor. I also voted for the plan.

13. Based on my political experience, I do not think that Pender County and its citizens will be harmed by being included in Districts 16 and 18 under the 2003 Plan. The county will have the advantage of

two Representatives working on their behalf in the General Assembly. Assuming the current incumbents are re-elected, Pender County also would have bi-partisan representation. Although I have resided in New Hanover County throughout my years as an elected Representative, I have always represented the interests of all the voters in my district, regardless of their county of residence. This is true of all legislators who are elected from districts which include all or portions of counties where they do not personally reside. I particularly remember the aftermath of Hurricane Floyd in September, 1999, when Pender County suffered terrible flooding. I received numerous calls from Pender County seeking assistance, even from areas not in my district. Because of my 20- year background in Emergency Medical Services, I was reviewing the situation reports which were being faxed daily by the Office of Emergency Management and which did not list Pender County or corroborate all the telephone calls I was receiving expressing a need for assistance. When I went to Pender County, I found the water still rising and many areas impassible. People in northeastern Pender County along the Cape Fear River were packing their possessions in john-boats and small row boats to escape the flooding. Highways 53 and 210 were impassable. I talked with the County Commissioners and worked to get this information to the Governor and his administration so

that Pender County was added to the list of declared disaster areas and the Office of Emergency Management added the County to its situation reports so that much needed aid could reach the County.

14. The delay of the primary from May to July has already adversely affected the 2004 elections. As an incumbent, the primary is usually over before the General Assembly convenes for the short session. I cannot raise money and campaign effectively in my district while the legislature is working on the budget. The threatened disruption of the 2004 election process which began in earnest in April with candidate filing, makes it difficult to cultivate relationships with voters in my new district. It also negatively impacts voter registration efforts and candidates' ability to educate the voters on issues, especially when there is a threat that election districts could change again at this late date. It is difficult to make decisions about spending campaign funds to get my message out to the voters when it is uncertain when the election will be held and in what district. There is a lot of time, hard work and organizational effort that goes into running an effective campaign, none of which can be accomplished overnight. Candidates and voters alike lose out when the election process is disrupted. Voter turnout is reduced when there is confusion about election dates. If the Court should require new districts to be drawn in the Pender, New Hanover, Columbus and

Brunswick areas so that legislative primary elections are held separate from the other primaries, voter turnout would be drastically reduced and voter confusion would be dramatically increased. These are not good conditions for something as important as the election of Representatives to the North Carolina General Assembly.

This the 17th day of June, 2004.

/s/Thomas E. Wright
Representative Thomas E. Wright

[notarial attestation omitted in printing]

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF WILLIAM R. GILKESON, JR.

William R. Gilkeson, Jr., being first sworn, deposes and says:

1. I reside at 2714 Wayland Drive in Raleigh, North Carolina. I received a B.A. in political science in 1969 from Southwestern at Memphis, now renamed Rhodes College, in Memphis Tennessee. I moved to North Carolina in 1970. I received a J.D. degree from the University of North Carolina School of Law in 1985. I was admitted to the State Bar that same year and immediately began work as a Staff Attorney in the Research Division of the North Carolina General Assembly, where I have worked ever since.

2. My chief specialty at the General Assembly has been election law. As a result of that specialty, I have been involved in redistricting since 1989 or 1990. I participated in the 1991-92 redistricting and in all the redistricting activities since that time. I received training and have developed expertise working on DistrictBuilder, the General Assembly's redistricting computer system.

3. Plaintiffs' proposed maps JLL07A and JLL08A were created using DistrictBuilder on the public access computer at the General Assembly. At the request of the Attorney General's Office, I used DistrictBuilder to prepare statistical profiles for plaintiffs' proposed maps JLL07A and JLL08A in the same format as the statistical profiles for the two illustrative maps included as attachments to the affidavit of Representative Martha B. Alexander. The statistical profile that I prepared for JLL07A is included as "Attachment A." and the statistical profile that I prepared for JLL08A is included as "Attachment B."

4. The legislative record shows that during the 1997 congressional redistricting process, an updated report on racially polarized voting was provided to the Senate Committee on Redistricting by counsel for minority defendant-intervenors in the *Shaw v. Hunt* litigation. A copy of the cover letter to the chair of the Senate Redistricting Committee, together with the memorandum report itself, is included as "Attachment C."

This the 21st day of June, 2004.

/s/William R. Gilkeson, Jr.
William R. Gilkeson, Jr.

[notarial attestation omitted in printing]

District Statistics		
Plan: JLL07A - District 1		
Ideal Population :	**67,078**	
Actual Population :	**63,963**	
Difference :	**-3,115**	
% Difference	**-4.64%**	
Total Population	63,963	100.00%
White (single-race)	37,250	58.24%
Black (single-race)	24,523	38.34%
Black (total)	24,801	38.77%
Native American (single-race)	270	0.42%
Asian/Pacific Islander (single-race)	170	0.27%
Other (single-race)	1,104	1.73%
Multi Race	646	1.01%
Hispanic	2,073	3.24%
Non-Hispanic	61,890	96.76%
Voting Age Total Population	48,834	100.00%
White (single-race)	30,119	61.68%
Black (single-race)	17,240	35.30%
Black (total)	17,360	35.55%
Native American (single-race)	203	0.42%
Voter Registration Total	38,439	100.00%
White	24,606	64.01%
Black	13,247	34.46%
Native American	66	0.17%
Other Race/Undesignated Race	299	0.78%
All Democrats	22,119	57.54%
All Republicans	9,981	25.97%
All Libertarians	124	0.32%

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of William R. Gilkeson, Jr., Attachment A

District Statistics		
Plan: JLL07A - District 1		
All Unaffiliated	6,215	16.17%
Black Democrats	11,671	52.76%
00 Governor Dem - Easley	12,615	65.48%
00 Governor Rep - Vinroot	6,302	32.71%
00 Chief Justice Dem - Frye	11,018	59.33%
00 Chief Justice Rep - Lake	7,553	40.67%
00 State Auditor Dem - Campbell	11,322	62.55%
00 State Auditor Rep - Merritt	6,780	37.45%
02 NC Supreme Court Dem - Butterfield	8,745	59.25%
02 NC Supreme Court Rep - Brady	6,014	40.75%
02 US Senate Dem - Bowles	8,966	56.82%
02 US Senate Rep - Dole	6,570	41.64%

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of William R. Gilkeson, Jr., Attachment B

District Statistics Plan: JLL08A - District 1		
Ideal Population :	**67,078**	
Actual Population :	**64,006**	
Difference :	**-3,072**	
% Difference	**-4.58%**	
Total Population	**64,006**	**100.00%**
White (single-race)	39,256	61.33%
Black (single-race)	22,444	35.07%
Black (total)	22,815	35.65%
Native American (single-race)	289	0.45%
Asian/Pacific Islander (single-race)	473	0.74%
Other (single-race)	729	1.14%
Multi Race	815	1.27%
Hispanic	1,657	2.59%
Non-Hispanic	62,349	97.41%
Voting Age Total Population	49,625	100.00%
White (single-race)	32,554	65.60%
Black (single-race)	15,516	31.27%
Black (total)	15,650	31.54%
Native American (single-race)	230	0.46%
Voter Registration Total	41,464	100.00%
White	28,669	69.14%
Black	12,045	29.05%
Native American	84	0.20%
Other Race/ Undesignated Race	666	1.61%
All Democrats	21,014	50.68%
All Republicans	12,127	29.25%

JLL08A / 2003 Database / 06/16/04 / 09:30 AM

Pender County v. Bartlett, No. 04 CVS 6966,
Affidavit of William R. Gilkeson, Jr., Attachment B

District Statistics Plan: JLL08A - District 1		
All Libertarians	209	0.50%
All Unaffiliated	8,114	19.57%
Black Democrats	10,327	49.14%
00 Governor Dem - Easley	12,956	66.52%
00 Governor Rep - Vinroot	6,012	30.87%
00 Chief Justice Dem - Frye	11,029	59.05%
00 Chief Justice Rep - Lake	7,649	40.95%
00 State Auditor Dem - Campbell	11,181	61.33%
00 State Auditor Rep - Merritt	7,049	38.67%
02 NC Supreme Court Dem - Butterfield	8,205	58.82%
02 NC Supreme Court Rep - Brady	5,744	41.18%
02 US Senate Dem - Bowles	8,525	56.55%
02 US Senate Rep - Dole	6,292	41.74%

FERGUSON, STEIN, WALLACE, ADKINS,
GRESHAM & SUMTER, P.A.
ATTORNEYS AT LAW
SUITE 300
741 KENILWORTH AVENUE
CHARLOTTE, NORTH CAROLINA 28204
TELEPHONE (704) 375-8461
TELECOPIER (704) 334-5654

March 11, 1997

Senator Roy Cooper
Chair, Senate Congressional Redistricting
Committee
16 West Jones Street
Raleigh, NC 27601

RE: Congressional Redistricting

Dear Senator Cooper:

As you may recall, this firm represents defendant-intervenors in the Shaw v. Hunt litigation. Included in the materials we submitted at the Joint Congressional Redistricting public hearing on February 26, 1997, was an analysis of racially polarized voting by Professor Richard Engstrom. Professor Engstrom's report was based on various

elections he analyzed prior to the trial in the Shaw v. Hunt case in 1994. We asked Professor Engstrom to update his study by looking at the most recent Gantt versus Helms election. In particular, we asked him to look at the level of racially polarized voting statewide as well as the level of racially polarized voting in the northeastern region of the state, which we defined as the eighteen counties that are included in the proposed First Congressional District in the Senate plan, 1997 Congressional Plan A.

There are two important findings in Professor Engstrom's updated analysis. First, he found that there is greater polarized voting in the northeast that in the state generally. Second, he found that turnout for African-American voters is significantly lower that turnout among non-African-American voters. Both of these findings support the proposition that there is a strong basis in fact for concluding that the legislature's failure to create a majority black district in the northeastern region of the state would violate Section 2 of the Voting Rights Act.

I am enclosing for your consideration a copy of the Professor Engstrom's report of his findings. Please feel free to give me a call if you have any questions. Thank you very much for your work on this important issue.

Sincerely yours,
/s/Anita Hodgkiss
Anita S. Hodgkiss

ASH/rer
cc: Members, Senate Redistricting Committee

Dep't of Political Science University of New Orleans
New Orleans, LA 70148

February 7, 1997

Ms. Anita S. Hodgkiss
Ferguson, Stein, Wallace, Adkins, Gresham, and Sumter
Suite 300
741 Kenilworth Ave.
Charlotte, NC 28204

Dear Ms. Hodgkiss:

I have performed, at your request, an analysis of the vote for Mr. Harvey B. Gantt in the November 1996 general election for a United States Senate seat in North Carolina. This work supplements the analysis of North Carolina elections that I performed previously for the State of North Carolina in the Shaw v. Hunt litigation. The methodologies employed in the analysis of this election, regression and homogeneous precinct analyses, are identical to those employed in my previous reports for the state. The voter registration data utilized to analyze this elections are for October 11, 1996, and therefore reflect the registered electorate at the time of this election.

The homogeneous precinct analysis concerns the votes cast in precincts in which over 90% of the registered voters was African American and in which less than 10% was African American. Mr. Gantt received 97.9% of the votes cast in the homogeneous African American precincts across the state, but only 38.1% in the homogeneous non-African American precincts. The voter participation rate in this election in the homogeneous African American precincts, expressed as a percent of the registered voters, was 49.6%, while the participation rate within the non-African American precincts was 59.0%.

The estimated support for Mr. Gantt among the African American voters in this election produced by the regression analysis, which is based on the votes cast in all of the precincts in the state, is 100%. His support among the no-African American voters is estimated by regression to have been 35.7%. The correlation coefficient for the relationship between the racial composition of the precincts and the vote for Gantt is a statistically significant .777. The regression estimate of the participation rate in this elections among state's African American registered voters is 46.8%, while that for non-African American is 58.9%.

You also requested the results of these analyses for the northeast region of the state, an area that you informed me is comprised of the following 18 counties: Beaufort, Bertie, Craven, Edgcomb, Gates, Granville,

Greene, Halifax, Hertford, Lenoir, Martin, Northampton, Pitt, Vance, Warren, Washington, Wayne, and Wilson. The vote in this are is more racially divided than in the state as a whole. Mr. Gantt received 96.6% of the votes cast in homogeneous non-African American precincts. Voter participation in these African American precincts, again expressed as a percentage of registered voters, was 50.2%, compared to 61.9% in the no-African American precincts.

The regression analysis of the votes cast in all of the precincts in these 18 counties places Mr. Gantt's support among the African American voters at 100% and his support among the non-African American voters at 24.9%. The correlation coefficient for the relationship between the racial composition of the precincts and the vote for Gantt is .930, higher than that for the state as a whole. This is also a statistically significant correlation. The regression estimates of the voter participation rates in the northeast region are 47.0% for African Americans and 61.6% for non-African Americans.

I hope you find this information useful. If you require any additional analysis, please let me know.

Sincerely,
/s/Richard L. Engstrom

Richard L. Engstrom
Research Professor of
Political Science

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF MILFORD FARRIOR

Milford Farrior, being first sworn, deposes and says:

1. I am above the age of 18 years, and I am competent to testify as to the matters set forth herein, which are based upon my personal knowledge and belief.

2. I am a life-long resident of Pender County and am active in community affairs. I am an African-American and I reside in Maple Hill.

3. Based on my experience, it is important for the African-American community in Pender and New Hanover counties to keep a North Carolina House district that can continue to elect a minority candidate.

4. It is important to the minority community to have people like Representative Thomas Wright serving in the General Assembly. Wright represents not only the African-American interests but also looks out for the interests of everyone in his district and for all of Pender County.

5. There is no problem having Pender County divided or combined with New Hanover County to

create a district. I do not think that a minority candidate from this area can be elected to the North Carolina House of Representatives if Pender County is kept whole in the formation of a House district.

6. I do not believe that the Board of County Commissioners of Pender County represents my interests or the interests of the minority community in Pender County with respect to their challenge to the House Plan enacted by the General Assembly in 2003.

7. I would like the opportunity to intervene in this lawsuit because I want to see that there continues to be a district in this area that gives minority candidates a chance to be elected. I need more time to talk with others in the community and to find legal representation. The North Carolina Attorney General's Office has agreed to file this affidavit on my behalf so that the Court will be aware of my concern that the interests of the minority community in Pender County be represented and heard in this lawsuit.

This the 17 day of June, 2004.

/s/Milford Farrior
Milford Farrior

[notarial attestation omitted in printing]

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AFFIDAVIT OF CINDY MOORE

Cindy Moore, being first sworn, deposes and says:

1. I am above the age of 18 years, and I am competent to testify as to the matters set forth herein, which are based upon my personal knowledge and belief.

2. I was born in Pender County and have been a resident of Pender County for the last 10 years. I am currently the chairperson of Pender County Fair Share, which is the local chapter of North Carolina Fair Share, a statewide non-partisan, non-profit membership, advocacy and leadership development organization comprised almost entirely of non-wealthy citizens. I am an activist in the community on local issues, particularly issues affecting the African-American community.

3. I am familiar with House District 18 as enacted by the North Carolina General Assembly in 2003, and I feel very strongly that this district should remain as it is. It is important when working on local issues to have a representative in the General Assembly who is familiar with the needs of the African-American community and is responsive to African-American

voters.

4. It is my view that if the district does not remain an effective African-American district, then I and other minority citizens in the area would not have someone in the General Assembly who would listen to us and there would not be a voice for our community in State government.

5. I do not believe that the Board of County Commissioners of Pender County represents my interests or the interests of the minority community in Pender County with respect to their challenge to the House Plan enacted by the General Assembly in 2003.

6. I am very interested in intervening in this lawsuit because I want to see that there continues to be a district in this area that gives minority candidates a chance to be elected. I need more time to talk with others in the community and to find legal representation. North Carolina Fair Share has previously been a plaintiff in an at least one election-related lawsuit. The North Carolina Attorney General's Office has agreed to file this affidavit on my behalf so that the Court will be aware of my concern that the interests of the minority community in Pender County be represented and heard in this lawsuit.

This the 18th day of June, 2004.

/s/Cindy Moore

Cindy Moore

[notarial attestation omitted in printing]

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

SECOND NOTICE OF FILING

Defendants' respectfully file the following documents, attached hereto, in support of Defendant's Motion for Summary Judgment:

1. Second Affidavit of Representative Thomas E. Wright
2. Report and Deposition Transcript of Kerry L. Haynie, Ph.D.
3. Report and Deposition Transcript of Richard L. Engstrom, Ph.D.
4. USDOJ Preclearance Letter of Stephenson Opinion
5. Deposition Transcript of Rep. Donald Bonner in *N.C. v. Ashcroft*, No. 1:03CV2477 (D. D.C.)
6. Deposition Transcript of Rep. Marvin Lucas in *N.C. v. Ashcroft*, No. 1:03CV2477 (D. D.C.)
7. Stipulations of the Parties:

   Ex. A. 1992 House Plan – map & statistics

   Ex. B. 2001 House Plan (Sutton House 3) – map & statistics

Ex. C.	2002 House Plan (Sutton House 5) – map & statistics
Ex. D.	Jenkins House Plan (Interim House) – map & statistics
Ex. E.	2003 House Plan – map & statistics
Ex. F.	List of 1980s Black House Representatives
Ex. G.	1991-1992 House of Representatives Demographics List
Ex. H.	1993-1994 House of Representatives Demographics List
Ex. I.	1995-1996 House of Representatives Demographics List
Ex. J.	1997-1998 House of Representatives Demographics List
Ex. K.	1999-2000 House of Representatives Demographics List
Ex. L.	2001-2002 House of Representatives Demographics List
Ex. M.	2003-2004 House of Representatives Demographics List
Ex. N.	2005-2006 House of Representatives Demographics List

Pender County v. Bartlett, No. 04 CVS 6966.
Second Notice of Filing

Ex. O.	Relevant portions of 2001 House Plan § 5 Submission materials
Ex. P.	Relevant portions of 2002 House Plan § 5 Submission materials
Ex. Q.	Relevant portions of 2003 House Plan Initial Disclosure of § 5 Submission materials
Ex. R.	1898 Headlines (WILMINGTON MORNING STAR, NEW YORK HERALD, RALEIGH NEWS & OBSERVER)
Ex. S.	New Hanover and Pender County Representatives since 1981
Ex. T.	Pender Census Reports: DP-1 – DP-4
Ex. U.	New Hanover Census Reports: DP-1 – DP-4
Ex. V.	Pender Census Profiles
Ex. W.	New Hanover Census Profiles
Ex. X.	North Carolina DHHS Health Statistics, statewide and Pender and New Hanover Counties
Ex. Y.	ABC Report Cards of Pender and New Hanover Counties
Ex. Z.	New Hanover Education LINC

Pender County v. Bartlett, No. 04 CVS 6966,
Second Notice of Filing

Ex. AA. Pender Education LINC

Ex. BB. AYP – New Hanover

Ex. CC. AYP – Pender

Ex. DD. Public Record Compendium

- Richard L. Engtrom, *Racial Differences in Candidate Preferences in North Carolina Elections*
- Declaration of State Senator Frank W. Ballance, Jr. in *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C.)
- Statement of Alice Ballance, in *Shaw v. Hunt*
- U.S. Department of Justice Post Card Mailing Investigation
- Compendium of North Carolina segregation laws
- Racial Attitudes of North Carolina: Summary of Focus Group and Survey Research Results (Dec. 1993)
- J. Morgan Kousser, *After 120 Years: Redistricting and Racial Discrimination in North Carolina* (March 1994)
- Statement of Harry L. Watson, Ph.D., in *Shaw v. Hunt*
- Statement of Alex W. Willingham, Ph.D., in *Shaw v. Hunt*

Respectfully submitted, this the 25th day of February, 2005.

ROY COOPER
Attorney General

/s/Tiare B. Smiley
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for the Defendants

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

SECOND AFFIDAVIT OF REPRESENTATIVE THOMAS E. WRIGHT

Representative Thomas E. Wright, being first sworn, deposes and says:

1. I am the duly elected Representative from House District 18. Elections in 2004 were held under the 2003 House Plan, in which District 18 includes portions of Pender and New Hanover Counties. In the 2004 election, I did not face a white opponent in the primary or general election.

2. As the Representative for District 18, I was involved in making decisions about redrawing legislative districts in 2003. In my earlier affidavit (signed 17 June 2004), I described that process and this affidavit supplements my earlier testimony. For purposes of maintaining a district which would provide black voters in the Pender/New Hanover area an equal opportunity to elect their candidate of choice in a legislative district, we first looked at data relating to primary elections and then for general elections. It has been demonstrated in North Carolina that black voters can elect their candidate of choice, which in most cases

means an African-American, in districts which are less than 50% in black total population or black voting age population. Because of the still overwhelming registration of blacks as Democrats, the first consideration in drawing an effective black district is the black Democratic registration - - *i.e.*, do the black voters have some likelihood of controlling the primary. If the black Democratic registration is over 50%, the black voters should control the Democratic primary. Winning the primary, however, is not the only consideration, the minority candidate must also have an opportunity to win in the general election. In North Carolina, for a black Democratic candidate to win the general election it is necessary to look at the overall Democratic strength of the district. In drawing the 2003 House Plan, this was accomplished by looking at other partisan election results, such as the relative success of Democratic candidates Bowles, Easley, Butterfield, Frye and Campbell. A Democratic performance index, which provided a weighted average of election data from several elections, was used as a predictor of the likely Democratic vote in various configurations of legislative districts under consideration. As a rule of thumb, if a black candidate wins the primary election, then a strongly Democratic district, even if not over 50% black in total population, will produce enough white votes to elect the black candidate of choice in a general election. It is this

political reality which allowed the House 2003 Plan to obtain § 5 pre-clearance as non-retrogressive, even though the black percentages in most districts drawn to maintain existing Voting Rights Act districts under § 2 and § 5, were reduced from earlier redistricting plans. Although the United States Department of Justice only pre-clears districts in § 5 counties, in its review the Department also looks at other districts in the State where there are significant minority populations and considers the totality of a plan's statewide effect on black voters in its retrogression analysis.

3. In the 2004 elections, District 18 performed as expected. Even though the District is less than 50% in total black population and black voting age population, no white candidates filed in the primary; in addition, the Democratic nature of the District also resulted in no white Republicans filing to run in the District. Of course, my incumbency, and I hope my past performance in representing the area (despite the different permutations of the district from the 1992 and 2002 plans) would have played a part in my success in 2004 in this newly configured District. The election results certainly demonstrate that black voters in the area can continue to elect a black candidate of choice as District 18 is now drawn. I know of no other plan that can be drawn within the two counties of Pender and New Hanover that would

maintain this opportunity for the black voters in the counties. The pattern of success by African-Americans in the 2004 House elections under the 2003 House Plan, comparing total black population, black voting age population and black Democratic registration, is remarkably similar to the success achieved under the 1992 House Plan and the Interim House Plan drawn by the court. *See* Attachment A, which is comparable to similar arrays of data attached to the Affidavit of Representative Martha Alexander (signed 9 June 2004) as Attachments A & B.

4. In creating District 18 and other Voting Rights Act districts, black legislators bring their own personal histories to the drawing board. As legislators, we have available to us the economic and social data collected by the Census Bureau and various State agencies. I am fully aware, just as are other black legislators, of the continuing disparities that exist for African-Americans and other minority citizens, as compared to white citizens, in income, health, housing and education. I take a particular interest in health and education issues because, among other committee assignments with leadership positions, I am serving as Chair of the House Committee on Health, as a Vice-Chair on the Appropriations Committee and as a member of the Subcommittee on Health and Human Services for the 2005-07 session of the General Assembly. In addition, I will continue in the current

session to be the Chair of the Appropriations Subcommittee on Capital, a member of both the Public Utilities Committee and the Insurance Committee and Vice-Chair of the Transportation Committee. Of particular interest to me currently is the scarcity of business and contracts going to minority businesses from all of the millions of dollars of bonds being spent on construction projects at the State's universities and community colleges. Because of the importance of education to all citizens, and especially black children, I also take a particular interest in the available information which continues to show a significant gap in the achievements of black students compared to white and other students statewide and in Pender and New Hanover Counties. As a legislator, I am concerned that people keep talking about the existing gap but are taking no action. As a legislator from a district with a diverse population, I represent all of my constituents regardless of race. However, as an African-American I also have a responsibility to see that issues of special concern to the minority community are raised and heard in the legislative chambers. I am the only African -American in the State House or Senate in the southeastern area of the state encompassing Bladen, Columbus, Brunswick, Duplin, Jones, Onslow, Carteret, Pender and New Hanover Counties.

5. As a citizen of North Carolina, who was born and raised in the City of Wilmington, I also bring to

the redistricting table my personal history and knowledge of racial division and discrimination in the State, which at one time was enforced as a matter of State policy and law. This is a history shared by other members of the Legislative Black Caucus. Public schools, restaurants and movies were all segregated when I was growing up. I personally did not attend a segregated public elementary school because my parents sent me to a Catholic school which was itself segregated until I reached fourth or fifth grade. However, I can remember the discussions around the dinner table when my sister was supposed to attend high school in 1969 in the first integrated class in New Hanover County. Because of my parents concerns about the volatility of the situation, she was sent to Philadelphia, although she returned to graduate with her class at New Hanover High School in 1969. I began attending public school in the ninth grade in 1970, at Williston Junior High. Williston had formerly been the black high school: Williston High School had played a central role in the black community of New Hanover and had its own traditions and history. My parents were graduates of Williston High School and often talked fondly about their whole high school experience. I started high school at Hoggard High School in 1971. I can still recall the volatile situation that existed in attending integrated schools in the early years. I vividly remember the atmosphere of tension, anxiety

and stress that existed; you could sense it, feel it and even smell it. Much of the stress for black and white students was having to adjust to so many other students they had never been to school with before: during breaks and at lunch there frequently were fights between black and white students.

6. My older brother attended Hoggard High School one year before I did, beginning in 1970. The experience in high school was much worse than in the junior high school. Black students did not feel included: there were no black cheerleaders: the best athletes or band members were able to participate, but for the average kids, they were left out of sports, band, and other extra curricular activities. Black students were having to assimilate into a new world and environment where they felt they were not included and many feared losing their identify. The black students were not having the social experiences in high school that their parents had talked about from their high school days. The feelings of exclusion escalated in 1971, when the black students of both Hoggard and New Hanover High Schools began to boycott classes. My brother, William Joe Wright, was outspoken and was a leader in the boycotts. Black students were requesting inclusion and ownership, to feel as if they were a part of the study body. About twelve weeks into the school year when there was no response to the concerns of the black students,

tensions escalated and the black students walked out. At first the students assembled at a park near the Williston Junior High School, but were removed by the county sheriff. Students boycotting were then provided sanctuary at the Gregory Congregational United Church of Christ where they assembled. The school's response was to expel students from school; this included my bother who was labeled as a troublemaker because he was willing to speak out. When the Wilmington Ten indictments for firebombing came down in 1971, my family felt it was no coincidence that my brother, and seven or eight other students involved in the school boycotts, were among the targets of that prosecution. The injustice of these indictments and convictions were not overturned until ten long years later when the Fourth Circuit Court of Appeals overturned the convictions. These are the kinds of personal life experiences that black legislators share with other black citizens of the State. The continuing effects of North Carolina's racial history can be seen in the economic, health and education disparities that exist today.

7. Senator Luther Henry Jordan, Jr., was the first black senator from the New Hanover area in modern times. His district, which was created in the 1990's, no longer exists because it is not possible to draw a Senate district in this area that is sufficiently compact to meet legal standards and in which the black

population is large enough to allow minorities to elect a candidate of their choice. Senator Jordan was the moving force behind the 1898 Wilmington Race Riot Commission established by the General Assembly in 2000. Since his passing, I have served in his place supporting the Commission's work. Although the violent race riots which overthrew the City's duly elected black government officials occurred long ago in Wilmington's history, it has been interesting to see people come forward today to talk about the riots and their aftermath. An oral history is being preserved as well as a report being written. In 1998, the University of North Carolina at Wilmington put on a program commemorating the 1898 Race Riot. People born and raised in the area, white and black, have family histories and stories that the community seems almost relieved to talk about as the Commission does its work. It is this history beginning as early as 1898 and continuing to today that provides the basis for North Carolina to continue to at least maintain a viable representative district in this area in which black voters have an equal opportunity to elect their candidate of choice.

This the 24 day of February, 2005.

/s/Thomas E. Wright
Representative Thomas E. Wright

[notarial attestation omitted in printing]

Pender County v. Bartlett, No. 04 CVS 6966, Second Affidavit of Representative Thomas E. Wright, Attachment A

Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan

TOTAL BLACK POP.		BLACK VOTING AGE POP		BLACK DEM. REGISTRATION	
Dist.	**% Black Pop**	**Dist.**	**% Black VAP**	**Dist.**	**% Black Dems**
27	55.98%				
		27	52.93%		
8	53.97%				
		8	50.36%		
				102	65.14%
102	51.04%				
		102	46.11%		
				27	60.40%
				8	58.61%
				99	57.65%
32	37.36%	32	36.22%		
23	36.54%	23	34.12%	100	50.34%

Pender County v. Bartlett, No. 04 CVS 6966, Second Affidavit of Representative Thomas E. Wright, Attachment A

Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan

Dist.	% Black Pop	Dist.	% Black VAP	Dist.	% Black Dems
38	35.11%	55	31.99%	38	47.46%
55	34.77%	38	31.63%		
100	34.11%	100	30.97%	106	46.21%
69	33.41%	69	30.73%	23	46.21%
99	31.01%	49	28.49%	32	45.35%
20	30.87%	99	28.29%	69	45.02%
44	30.71%	20	28.29%	63	44.14%
49	29.90%	63	27.86%	77	42.74%
63	29.73%	1	27.49%	44	42.06%
		44	27.45%	55	41.82%
66	28.84%			4	40.76%
106	28.75%	22	26.78%	49	40.09%
1	28.69%	66	26.61%	22	39.02%
22	28.31%	10	26.01%	45	38.91%
10	27.73%	25	25.87%	14	38.55%
25	27.26%	106	25.50%	1	37.77%
6	27.03%	4	24.86%	25	37.72%
45	26.69%	50	24.69%	6	36.89%
77	26.50%	77	24.38%	9	36.63%
4	26.02%	6	24.27%	10	36.61%
46	25.74%	45	24.19%	66	36.44%
59	25.73%	46	23.94%	59	36.39%
50	24.98%	59	23.52%	57	36.34%
111	24.16%	65	22.18%	20	36.01%
14	24.06%	53	21.75%	109	35.98%
53	23.92%	14	21.75%	50	34.65%

Pender County v. Bartlett, No. 04 CVS 6966, Second Affidavit of Representative Thomas E. Wright, Attachment A

Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan

Dist.	% Black Pop	Dist.	% Black VAP	Dist.	% Black Dems
2	23.74%	111	21.71%	65	34.20%
65	23.58%	30	21.70%	111	34.10%
30	23.35%	2	21.46%	11	33.20%
9	23.12%	57	21.38%	53	32.70%
57	22.84%	9	21.18%	52	32.69%
109	22.29%	11	20.58%	103	30.40%
11	21.93%	109	19.62%	26	30.04%
51	20.71%	51	19.18%	46	29.98%
26	20.26%	26	18.83%	3	29.57%
81	17.15%	47	15.66%	51	29.45%
47	16.46%	81	15.64%	37	29.34%
15	16.42%	54	15.49%	2	29.04%
54	16.02%	37	14.96%	82	28.88%
52	15.91%	15	14.91%	81	28.86%
3	15.81%	3	14.77%	30	27.73%
37	15.45%	52	13.98%	61	27.15%
95	14.87%	95	13.39%	79	26.17%
103	14.47%	34	13.19%	95	26.07%
34	14.30%	103	13.03%	98	26.01%
82	14.09%	82	13.00%	54	23.77%
61	13.40%	79	11.96%	15	22.18%
79	12.94%	61	11.76%	83	21.75%
17	12.85%	56	11.72%	28	21.21%
56	12.70%	17	11.18%	34	19.67%
112	12.08%	112	10.78%	17	19.36%
13	11.62%	13	10.47%	75	19.22%

Pender County v. Bartlett, No. 04 CVS 6966, Second Affidavit of Representative Thomas E. Wright, Attachment A

Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan

Dist.	% Black Pop	Dist.	% Black VAP	Dist.	% Black Dems
35	11.49%	35	10.39%	41	18.89%
115	11.14%	110	10.05%	13	18.86%
110	11.12%	115	9.96%	62	18.73%
83	10.91%	83	9.91%	40	18.19%
28	10.82%	28	9.80%	16	18.14%
98	10.31%	98	9.64%	70	18.01%
67	10.15%	67	9.24%	88	17.90%
88	10.00%	88	8.89%	110	17.61%
75	9.33%	62	8.63%	35	17.12%
114	9.22%	41	8.54%	112	16.95%
108	8.88%	40	8.49%	67	16.65%
40	8.86%	75	8.35%	74	16.62%
62	8.81%	64	8.24%	56	16.60%
64	8.77%	108	8.19%	73	16.16%
74	8.74%	114	8.07%	47	15.76%
41	8.70%	74	7.99%	68	15.68%
16	8.63%	86	7.64%	64	15.29%
86	8.29%	16	7.59%	108	15.29%
70	7.83%	70	7.06%	115	15.11%
89	6.88%	91	6.52%	96	14.45%
96	6.77%	89	6.39%	89	14.35%
91	6.74%	97	5.98%	105	13.61%
97	6.69%	96	5.93%	86	13.57%
68	6.43%	68	5.92%	91	12.91%
19	6.33%	73	5.70%	76	12.64%
73	6.14%	36	5.60%	97	11.59%

Pender County v. Bartlett, No. 04 CVS 6966, Second Affidavit of Representative Thomas E. Wright, Attachment A

Black Population, Black Voting Age Population, Black Democratic Registration in 2003 House Plan

Dist.	% Black Pop	Dist.	% Black VAP	Dist.	% Black Dems
76	5.98%	19	5.51%	114	11.56%
36	5.80%	76	5.38%	36	11.55%
87	4.93%	105	4.48%	19	10.39%
104	4.84%	85	4.35%	87	10.05%
105	4.77%	87	4.32%	104	9.92%
94	4.40%	104	4.22%	94	9.58%
90	4.27%	94	4.12%	78	9.33%
113	4.17%	90	3.89%	80	9.15%
85	4.12%	78	3.84%	113	8.13%
78	4.01%	113	3.50%	92	7.61%
117	3.83%	80	3.37%	117	7.13%
80	3.63%	92	3.31%	90	6.15%
92	3.45%	117	3.26%	84	5.43%
116	3.24%	84	3.14%	85	5.39%
84	3.20%	116	2.65%	116	3.81%
119	1.44%	119	1.45%	93	2.16%
93	1.39%	118	1.34%	119	1.72%
118	1.38%	93	1.34%	118	1.43%
120	1.38%	120	1.15%	120	1.42%

Shading indicates an African-American was elected to district in 2004 Election

Pender County v. Bartlett

by

Richard L. Engstrom, Ph.D.

1. My name is Richard L. Engstrom and I am a resident of New Orleans, Louisiana. I am a Research Professor of Political Science and Coordinator of Graduate Studies in the Department of Political Science at the University of New Orleans (UNO), and the Endowed Professor of African Studies at UNO. I have served two terms as the Chairperson of the Representation and Electoral Systems Section of the American Political Science Association (1993-1995, 1995-1997) and continue to serve as a member of the Executive Council for that section. A copy of my curriculum vitae is attached as an Appendix to this report.

2. I have done extensive research in the relationship between election systems and the ability of minority voters to participate fully in the political process and to elect representatives of their choice. The results of my research have been published in the *American Political Science Review*, *Journal of Politics*, *Western Political Quarterly*, *Legislative Studies Quarterly*, *Social Science Quarterly*, *Journal of Law and Politics*, *Electoral Studies*, *Representation*, *Publius*, and other journals and books. Three articles authored or co-authored by me were cited with

approval in Thornburg v. Gingles, 478 U.S. 30, 46 n.11, 49 n.15, 53 n.20, 55, and 71 (1986), the Supreme Court decision interpreting amended section 2 of the Voting Rights Act. I am a co-author, with Mark A. Rush, of *Fair and Effective Representation? Debating Electoral Reform and Minority Rights* (Lanham, MD: Rowman and Littlefield Publishers, Inc. 2001).

3. I have also testified as an expert witness in a number of voting rights cases in federal and state courts across the United States. Since 2001 I have testified at trial and/or been deposed in the following cases: Johnson v. Hamrick (N.D. Ga. 2001), Del Rio v. Perry (200th Dist. Ct. Tx. 2001), Balderas v. State of Texas (E.D. Tx 2001), Johnson v. Bush (S.D. Flda 2001), Jepsen v. Vigil-Giron (1st Judicial District Court, County of Santa Fe, NM 2001, 2002), Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission (Superior Court, County of Maricopa, AZ, 2002), Curry v. Glendening, Court of Appeals of Maryland (2002), Levy v. Miami-Dade Co. (S.D. Flda. 2002), Dillard v. Baldwin Co. (M.D. Ala. 2002), Prejean v. Foster (M.D. La. 2002), Georgia v. Ashcroft (D.C. DC, 2002), Louisiana House of Representatives v. Ashcroft (D.C. DC 2002), United States v. Alamosa County (D. Co. 2003), Comacho v. Galvin and Black Political Task Force v. Galvin, (D.C. Mass. 2003), Stewart v. Blackwell (N.D. Oh. 2004), and Cottier v. City of Martin, S.D., (D.C. SD 2004).

4. Attorneys with the North Carolina Justice Department have asked me to examine recent elections (from 1998 through 2002) presenting voters with a choice between or among African American and non-African American candidates in Pender and New Hanover Counties in North Carolina. The purpose of this examination is to determine the extent to which voting has been racially polarized in these elections. I did a previous analysis of this type for the state in the case of Shaw v. Hunt, 861 F. Supp. 408, 465 (E.D.N.C. 1994) that served as the basis for a finding of racially polarized voting in that case, a finding that was not disturbed on appeal. I also provided a supplemental analysis of the vote for Mr. Harvey B. Gantt in the November 1996 general election for the United States Senate using the same methodologies employed in my racially polarized voting analysis in Shaw.

5. I am being compensated at a rate of $225 an hour for my work in this case.

METHODOLOGY

6. The data utilized in the analyses of these elections consist of information on the race of the registered voters in each of the voting precincts in these counties at the time of the elections, and election returns by precinct for these elections. These data were provided to me by legislative and Board of Elections staff who maintain such data for the State of North Carolina.

7. In assessing the extent to which the candidate preferences of the African American voters differed from those of the non-African American voters in these elections, I have derived estimates of group support for candidates through three analytic procedures. These include the two methods approved for this purpose by the United States Supreme Court in Thornburg v. Gingles [478 U.S. 30, 52-53 (1986)], which are ecological regression analysis and homogeneous precinct (or extreme case) analysis. Homogeneous precinct analyses simply report the relative levels of support a candidate or set of candidates received within the precincts in which less than 10 percent of the registered voters was African American and within those in which over 90 percent was African American.[1] Regression analyses provide estimates of the support for the various candidates among both African American and non-African American voters based on the votes cast in all of the precincts in an election.[2]

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[1] There are no homogeneous African American precincts in the Pender County elections analyzed for this report.

[2] Correlation coefficients reflecting how consistently the vote for a candidate varies with the relative presence of African Americans in the precincts are reported along with the results of the regression analyses. The correlation coefficient can achieve values ranging from 1.0 to -1.0. A value of 1.0 indicates that as the African American

The third methodology I employ is called Ecological Inference (or EI). This is an estimation procedure that also takes into account the votes cast in all of the precincts that was developed for this purpose subsequent to Thornburg v. Gingles by Gary King.[3] It is now common for expert witnesses to rely upon EI estimates of racial divisions in candidate preferences in providing evidence in cases involving the federal Voting Right Act.

RESULTS

8. The results of my analyses of these recent elections reveal, in both counties, pronounced and persistent patterns of racially polarized voting. Reported in Tables 1 and 2 are the results of elections

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percentage increases across precincts, there is a perfectly consistent increase in the support received by a designated candidate. A value of -1.0 indicates a perfectly consistent decrease in the support received. When the statistical probability of a coefficient is less than .05, that coefficient is identified as statistically significant. The correlation coefficients in the tables below that are statistically significant are identified with an "*" following the value of the coefficient.

[3] This procedure is the subject of Gary King, A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data (Princeton University Press, 1997).

in which voters had a single vote to cast. These include elections in which all of the voters in a county, or in the City of Wilmington in New Hanover County, could participate, and Democratic primaries in which only the voters registered as Democrats or as unaffiliated with a political party may participate.[4] Reported in Table 3 are the results for elections in which voters had more than one vote to cast. These are the 2000 general election for the Hanover County Board of Education and the nonpartisan election for the Wilmington City Council in October 1999.[5]

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[4] The analyses of the Democratic primary elections employed the data for Democratic and unaffiliated registered voters, rather than the data for all voters. The racial breakdowns of voters in these elections are not provided by party. These analyses treat all registered African Americans as eligible to vote in the Democratic primary, given that relatively few of them are likely to be registered as Republicans. When a primary election is between more than two candidates, the number of opponents an African American candidate has is identified in the table.

[5] Given the multiple vote nature of these elections, the results reported for them are not the percentages of those voting in the particular election contest that voted for a particular candidate, as in Tables 1 and 2, but rather the percentage of those receiving ballots for the election that voted for a particular candidate. Partisan primary elections

9. The results for six single vote elections in Pender County are contained in Table 1. The analyses for five of these elections are consistent across the estimation procedures – the African American candidate was the choice, usually overwhelmingly, of the African American voters, but not the choice of non-African American voters. The exception was the May 5, 1998 election for the District 1 seat on the Board of Education, in which the EI analysis indicates that Ms. Wallace was clearly the choice of the African American voters, while the regression analysis indicates that she was not their choice. In neither analysis was she the choice of the non-African American voters.

10. The results of the six single vote elections in New Hanover County are reported in Table 2. All of the estimation procedures show the African American candidates to be the choice of non-African American voters, again usually overwhelmingly, in every election. Non-African Americans did not share this preference in five of the six cases, the exception being

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in which voters cast more than one vote are not included because the data necessary to perform these analyses have not been retained. Two multiple vote elections, those for four seats on the New Hanover Board of Education and for two nonpartisan Soil and Water Conservation District Supervisors in New Hanover County in the November 2002, have not been analyzed because the necessary data have not been provided.

their support for Mr. McQueen in the November 3, 1998 general election for sheriff.

11. The results of the two multiple vote elections in which all registered voters in the particular jurisdiction could have voted are contained in Table 3. The African American candidates in these elections ranked at the top of the vote cast by African American voters, and when there were two, they finished first and second. They were not so favored by the non-African American voters. In the 2000 general election for the New Hanover County Board of Education, in which each voter had 3 votes to cast, Ms. Hankins was the candidate receiving the most votes from the African Americans receiving ballots, over 90 percent, but finished last among the six candidates in the votes cast by non-African Americans. In the nonpartisan Wilmington City Council election in 2000, in which voters also had three votes apiece, Ms. Hughes received a vote from over 90 percent of the African Americans receiving ballots, but finished sixth out of the 15 candidates in the EI analysis, and seventh in the regression analysis, in the non-African American vote with about 17 percent. Mr. McDuffie finished second in the votes cast by African Americans, receiving a vote from about 46 percent of them receiving ballots, but was ninth in the vote cast by non-African Americans, with a corresponding percentage of around 6.0.

12. The analyses of recent elections in both Pender and New Hanover Counties in which voters have been faced with a biracial choice of candidates reveal racially polarized voting. These results are similar to those I reported for elections across the state in my previous report for the Shaw case.

Richard L. Engstrom
February 9, 2005

TABLE 1

**Racial Differences in Support for
African American Candidates
Single Vote Elections**

PENDER COUNTY
Reported in the following order:
Ecological Inference
Regression Analysis
Homogeneous Precincts
[CC = Correlation Coefficient]

Candidate	% of Afr. Am.	% of Non-AA	CC
November 5, 2002			
County Commission, D.2			
Arthur (Monk)	90.3	23.3	
Smith	115.0	25.5	947*
	-----	31.4	
Sheriff			
Bennie L. Corbett	90.2	23.4	
	128.0	17.7	.943
	----	26.1	

Pender County v. Bartlett, No. 04 CVS 6966,
Engstrom Report, Table 1

Candidate	% of Afr. Am.	% of Non-AA	CC
District Court Judge			
James Henry	97.2	31.1	
Faison	96.3	48.0	.884*
	----	48.8	
<u>September 10, 2002 (Dem. Primary)</u>			
Sheriff			
Bennie L. Corbett	60.4	3.4	
(v. four others)	74.6	4.7	.870*
	----	3.9	
<u>November 7, 2002</u>			
County Commissioner D. 3			
James H. Faison,	92.9	23.6	
Jr.	110.4	28.7	.962*
	----	34.2	
<u>May 5, 1998</u>			
Board of Education, D.1			
Irene C. Wallace	77.2	19.0	
	45.0	32.5	.216
	----	33.0	

TABLE 2

**Racial Differences in Support for
African American Candidates
Single Vote Elections**

NEW HANOVER COUNTY
Reported in the following order:
Ecological Inference
Regression Analysis
Homogeneous Precincts
[CC = Correlation Coefficient]

Candidate	% of Afr. Am.	% of Non-AA	CC
<u>September 10, 2002 (Dem. Primary)</u>			
Sheriff			
James H. Smyre, Jr	82.2	10.2	
(v. two others)	91.2	9.1	.948*
	78.6	13.0	
<u>May 2, 2000 (Dem. Primary)</u>			
Register of Deeds			
Sandra B. Randolph	88.6	25.2	
	95.2	22.6	.928*
	89.7	26.1	

Pender County v. Bartlett, No. 04 CVS 6966,
Engstrom Report, Table 2

Candidate	% of Afr. Am.	% of Non-AA	CC
November 2, 1999			
Wilmington City Council, Runoff			
Sandra Spaulding	93.1	33.4	
Hughes	114.4	27.4	.910*
	98.6	30.3	
November 3, 1998			
Sheriff			
Joseph McQueen,	96.5	62.0	
Jr.	111.1	61.3	.872*
	93.4	62.8	
Clerk of Court			
Harold A. Hicks	90.9	21.2	
	115.2	20.5	.963*
	93.4	23.0	
May 5, 1998			
Wilmington City Council (Special Election)			
Herb McDuffie	67.5	3.6	
(v. 5 others)	108.5	2.5	.922*
	80.2	4.1	

Pender County v. Bartlett, No. 04 CVS 6966,
Engstrom Report, Table 3

Table 3

Estimated Racial Differences in Candidate Support Elections with More than One Vote

NEW HANOVER COUNTY*
In the following order:
Ecological Inference
Regression Analysis
Homogeneous Precincts
[CC = Correlation Coefficient]

Candidates	Afr. Am. Voters	Non-AA Voters	CC
November 7, 2000			
New Hanover Board of Education, 3 votes			
Lethia S. Hankins	98.6	33.4	
	104.1	32.6	.943*
	93.6	34.6	
Mark A. Lewis	80.9	37.7	
	80.7	37.8	.901*
	74.9	39.2	

*** African American candidates are identified in bold type.**

Pender County v. Bartlett, No. 04 CVS 6966.
Engstrom Report, Table 3

Candidates	Afr. Am. Voters	Non-AA Voters	CC
Maryann Nunnally	80.6	45.1	
	80.1	45.2	.844*
	74.0	46.3	
Debbie Keck	.09	46.5	
	-6.0	47.5	-.902*
	3.6	46.2	
Nancy Wigley	0.7	48.2	
	-7.3	49.4	-.901
	3.5	48.2	
Jeanette S. Nichols	0.6	47.6	
	-7.6	48.7	-901
	2.4	47.4	

October 5, 1999

Wilmington City Council
3 votes

Sandra S. Hughes	93.0	17.7	
	98.6	16.4	.960*
	88.2	17.6	

*** African American candidates are identified in bold type.**

Pender County v. Bartlett, No. 04 CVS 6966,
Engstrom Report, Table 3

Candidates	Afr. Am. Voters	Non-AA Voters	CC
Herb McDuffie	46.1	6.1	
	46.4	6.1	.905*
	49.8	7.0	
Ron Shackleford	27.4	26.4	
	23.4	27.2	-.071
	22.8	28.5	
Denny Best	22.8	4.9	
	21.9	5.1	.721*
	15.3	5.0	
Laura Padgett	13.2	54.2	
	16.3	53.5	-.770*
	14.1	51.4	
Berry A. Williams	6.4	17.4	
	6.2	17.4	-.424*
	7.0	16.9	
Frank Conlon	5.2	52.5	
	2.3	53.1	-.728
	8.0	52.2	
Jim Quinn	4.0	51.0	
	-4.5	52.9	-.852*
	6.8	53.1	

*** African American candidates are identified in bold type.**

Pender County v. Bartlett, No. 04 CVS 6966,
Engstrom Report, Table 3

Candidates	Afr. Am. Voters	Non-AA Voters	CC
Rod Rodriguez	2.7	2.3	
	2.9	2.2	.166
	1.9	2.0	
Brett M.	2.5	1.5	
Silvermann	1.2	1.7	-.115*
	0.2	1.5	
Dana E. Page	1.7	3.2	
	2.0	3.1	-.216
	2.1	3.0	
Braxton D.	1.7	2.7	
Honeycutt	2.2	2.6	-.083
	1.7	2.5	
Jack Watkins	1.2	23.3	
	-0.8	23.8	-.840*
	2.4	23.5	
Lee Weathers	0.9	1.0	
	0.6	1.1	-.187
	0.9	1.0	
Michael Plesch	.07	6.7	
	-0.6	7.0	-.555*
	0.5	7.0	

*** African American candidates are identified in bold type.**

STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04 CVS 6966
[full caption omitted in printing]

AMENDED STIPULATIONS OF THE PARTIES

I. HOUSE REDISTRICTING PLANS

1. The 1992 Plan: the 1992 House redistricting plan enacted by the General Assembly (1991 N.C. Sess. Laws 5 (Extra Session)). A map and statistical data pack of this plan, which was taken from the North Carolina General Assembly's DistrictBuilder System and the accuracy and authenticity of which are stipulated to by the parties, are attached as Exhibit A.

2. The 2001 Plan: the first House redistricting plan enacted by the General Assembly after the 2000 Census (2001 N.C. Sess. Laws 459, also known as "Sutton House Plan 3"), invalidated by the Honorable Knox V. Jenkins, whose decision was affirmed by the North Carolina Supreme Court at *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*"). A map and statistical data pack of this plan, which was taken from the North Carolina General Assembly's DistrictBuilder System and the accuracy and authenticity of which are stipulated to by the parties, are attached as Exhibit B.

3. The 2002 Plan: the second House redistricting plan ("Sutton House Plan 5") enacted by the General Assembly after the decision of the North Carolina Supreme Court in *Stephenson I*, invalidated by the Honorable Knox V. Jenkins, whose decision was affirmed by the North Carolina Supreme Court at *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"). A map and statistical data pack of this plan, which was taken from the North Carolina General Assembly's DistrictBuilder System and the accuracy and authenticity of which are stipulated to by the parties, are attached as Exhibit C.

4. Jenkins Plan: the House redistricting plan (also known as "Interim House Plan") adopted by the Honorable Knox V. Jenkins and affirmed by the North Carolina Supreme Court, which was used for the 2002 legislative elections. A map and statistical data pack of this plan, which was taken from the North Carolina General Assembly's DistrictBuilder System and the accuracy and authenticity of which are stipulated to by the parties, are attached as Exhibit D.

5. The 2003 Plan: the third House districting plan enacted by the General Assembly after the 2000 Census (2003 N.C. Sess. Laws 434 (1st Extra Sess.), which was used for the 2004 legislative elections and which is the legislative districting plan currently in place. A map and statistical data pack of this plan, which was taken from the North Carolina General

Assembly's DistrictBuilder System and the accuracy and authenticity of which are stipulated to by the parties, are attached as Exhibit E.

6. A district identified in the five House plans in ¶¶ 1-5 as a VRA District is a district either (1) identified by the General Assembly as a district drawn in order to comply with § 2 or § 5 of the Voting Rights Act, 28 U.S.C. § 1973(a) and § 1973c; or (2) identified by the Honorable Knox V. Jenkins or by the North Carolina Supreme Court in *Stephenson I* or *Stephenson II* as a district drawn in order to comply with § 2 or § 5 of the Voting Rights Act. By stipulating that any given district was identified by the General Assembly or the courts as a "VRA district," plaintiffs specifically do not stipulate that such district was in fact required by the Voting Rights Act.

II. THE GENERAL ASSEMBLY

7. The North Carolina General Assembly consists of the Senate and the House of Representatives. N.C. CONST. art. II, § 1. Members of both the Senate and the House of Representatives are elected for two-year terms. N.C. CONST. art. II, §§ 2 and 4.

8. The North Carolina House of Representatives has 120 members.

9. Pursuant to the decisions of the North Carolina Supreme Court in *Stephenson I* and *Stephenson II*, in 2002 and 2004 these 120 members were elected from 120 single-member districts. The terms of the members elected in 2002 commenced on January 1, 2003, and the terms of the members elected in 2004 commenced on January 1, 2005.

10. At the time of redistricting in 1981 and 1982, there were 3 African-Americans serving in the House. After the 1982 redistricting, 11 African-Americans served in the House in 1983. After the *Gingles* litigation and redistricting, 13 African-Americans served in the House in 1985 and in 1987; and 14 served in 1989. The names of the African-American Representatives and the districts they represented are contained in Exhibit F. Of the 120 members of the 1991 House, 81 were Democrats and 39 were Republicans; 105 were white, 14 were African-American, and 1 was a Native American. The demographic list for 1991 issued by the Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit G.

11. After the 1991 redistricting, of the 120 members of the 1993 House, 78 were Democrats and 42 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American. The demographic list for 1993 issued by the Principle Clerk

of the House, which lists freshman, female and minority member of the House, is attached as Exhibit H.

12. Of the 120 members of the 1995 House, 52 were Democrats and 68 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American. The demographic list for 1995 issued by the Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit I.

13. Of the 120 members of the 1997 House, 59 were Democrats and 61 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American. The demographic list for 1997 issued by the Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit J.

14. Of the 120 members of the 1999 House, 66 were Democrats and 55 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American. The demographic list for 1999 issued by the Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit K.

15. Of the 120 members of the 2001 House, 62 were Democrats and 58 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American. The demographic list for 2001 issued by the

Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit L.

16. After the 2001 and 2002 redistricting and elections under the Jenkins Plan, of the 120 members of the 2003 House, 60 or 61 were Democrats and 59 or 60 were Republicans (the fluctuation in numbers being to due to a representative who changed party affiliation twice during the 2003 session); 101 were white, 18 were African-American, and 1 was a Native American. The demographic list for 2003 issued by the Principle Clerk of the House, which lists freshman, female and minority member of the House, is attached as Exhibit M.

17. After election under the legislature's 2003 Plan, of the 120 members of the current 2005 House, 63 are Democrats and 57 are Republicans; 100 are white, 19 are African-American, and 1 is a Native American. A listing of all 2005 representatives by political party and race is attached as Exhibit N.

III. REDISTRICTING SINCE 1982 AS IT HAS EFFECTED PENDER COUNTY

18. In the House redistricting plan enacted in 1982 and modified in response to *Gingles*, which remained in effect until the 1992 elections, Pender County was divided between two districts: District 12,

which also included Sampson and Bladen counties, and District 14, which also included Brunswick County and a portion of New Hanover County.

19. In the 1992 Plan, which remained in effect until the 2002 elections, Pender County was divided between three districts: District 12, which included portions of Pender, and Sampson counties; District 96, which included portions of Pender, Bladen, Cumberland and Sampson counties; and District 98, which included portions of Pender, Brunswick, Columbus and New Hanover counties. District 98 was identified by the General Assembly as a VRA district; it had a total black population of 59.26% and a black voting age population of 55.72%, based on the 1990 Census. Based on the 2000 Census, District 98 had a total black population of 50.70% and a black voting age population of 47.07. *See* Exhibit A.

20. In the 2001 Plan, Pender County was divided between five districts: District 13, which included portions of Pender, Carteret, Craven and Onslow counties; District 15, which included portions of Pender, New Hanover and Onslow counties; District 18, which included portions of Pender, Brunswick, Columbus and New Hanover Counties; District 19, which included portions of Pender, Bladen, Cumberland, New Hanover and Sampson counties; and District 20, which included portions of Pender, Johnston and Sampson counties. District 18 was

identified by the General Assembly and the courts as a VRA district; it had a total black population of 44.00%, a black voting age population of 40.38%. *See* Exhibit B. The State's § 5 preclearance submission materials to the United States Department of Justice regarding District 18 are attached as Exhibit O (without attachments).

21. In the 2002 Plan, Pender County was in a single district – District 16 – which also included a portion of New Hanover County. District 16 was not identified by the General Assembly as a VRA district. However, District 18, which included portions of three counties (Brunswick, Columbus and New Hanover), was identified by the General Assembly and the courts as a VRA district. District 18 had a total black population of 44.00% and a black voting age population of 40.41%. *See* Exhibit C. The State's § 5 preclearance submission materials to the United States Department of Justice regarding District 18 are attached as Exhibit P (without attachments).

22. In the Jenkins Plan, Pender County was in a single district – District 16 – which also included a portion of New Hanover County. District 16 was not identified by Judge Jenkins as a VRA district. However, District 18, which included portions of three counties (Brunswick, Columbus and New Hanover), was identified by Judge Jenkins as a VRA district; it

had a total black population of 46.99% and a black voting age population of 43.44%. *See* Exhibit D.

23. In the 2003 Plan, Pender County was divided between two districts – Districts 16 and 18 – both of which also contained portions of New Hanover County. District 18 was identified by the General Assembly as a VRA district, drawn to comply with the provisions of § 2 of the Voting Rights Act; it has a total black population of 42.89%, a black voting age population of 39.36% and black Democratic registration of 53.72%. *See* Exhibit E. That State's § 5 preclearance materials regarding District 18 are attached as Exhibit Q (without attachments).

IV. NEW HANOVER COUNTY

24. New Hanover County, bounded by Pender and Brunswick counties, the Cape Fear River and the Atlantic Ocean, covers 198 square miles, making it the second smallest county in North Carolina. It is also one of North Carolina's most densely populated counties. The first federal census in 1790, showed New Hanover County's population at 7,000. The population in 2000, according to the 2000 Census, of 160,307 was a 33.3 percent increase from 1990. The United States Census Bureau projects that, by 2010, the population of New Hanover County will be nearly 195,000.

25. Originally including the present-day Pender County, New Hanover County was formed in 1729 from Craven County and was named for the House of Hanover, the ruling family of Britain at that time. New Hanover County includes the historically-significant port city of Wilmington, the county seat and the home of the University of North Carolina at Wilmington, as well as the resort towns of Carolina Beach, Kure Beach and Wrightsville Beach. Tourism and film production as well as service and retail businesses are central to the economy of the county.

26. In the late nineteenth century, the port city of Wilmington was the largest city in North Carolina. A majority of the city's population was African American. By 1897, blacks owned 13.6% of the 918 businesses listed in the Wilmington city directory. There were 40 African American justices of the peace in New Hanover County, along with the county treasurer, recorder of deeds, coroner, and assistant sheriff. Wilmington had three African American aldermen, two all-black fire companies, and numerous black policemen, mail carriers, and health inspectors.

27. On November 10, 1898, an incident occurred in Wilmington that is commonly known as "the Wilmington Race Riot." According to many historical accounts, there is evidence to support a finding that a white mob took control of the reins of government in the city and, in so doing forced the resignation of the

existing government, including the three African American aldermen, from office by threatening their safety, destroyed the local black-owned newspaper office and terrorized the African American community. *See, e.g.*, H. LEON PRATHER, SR., WE HAVE TAKEN A CITY: WILMINGTON RACIAL MASSACRE AND COUP OF 1898 (1984). In the months thereafter, many African Americans fled Wilmington, and political upheaval resulted across the state and legal restrictions were placed on the right of African Americans to vote. *See* Section VII *infra*. Copies of headlines from the November 11, 1898, editions of the Wilmington Morning Star, the New York Herald and the Raleigh News & Observer are attached as Exhibit R.

28. In 2000, the North Carolina General Assembly created the 1898 Wilmington Race Riot Commission. 2000 N.C. Sess. Laws 138, § 17.1. Pursuant to § 17.1(b) of that Act,

> The purpose of the Commission shall be to develop a historical record of the 1898 Wilmington Race Riot. In developing such a record, the Commission shall gather information, including oral testimony from descendants of those affected by the riot or others, examine documents and writings, and otherwise take such actions as

> may be necessary or proper in accurately identifying information having historical significance to the 1898 Wilmington Race Riot, including the economic impact of the riot on African-Americans in this State.

The Commission is chaired by North Carolina Representative Thomas E. Wright of New Hanover County. Rep. Wright represents District 18, which includes a portion of Pender County and a portion of New Hanover County. Professor Irving Joyner of North Carolina Central University is the vice-chair. The full board is composed of thirteen members who are appointed by the legislature, the governor, mayor and city council of Wilmington, and New Hanover County Commission. The Department of Cultural Resources provides research and administrative assistance. A final report from the Commission is expected to be completed by December 31, 2005.

29. New Hanover County is governed by a Board of County Commissioners comprised of five members, who are elected at large through partisan elections in even-numbered years. Members are elected to serve staggered terms of 4 years, with elections held every two years. All five of the current members of the New Hanover Board of County Commissioners are Republicans. Since 1980, one minority, Jonathan

Barfield, Sr., a black Democrat, won election to the New Hanover Board of County Commissioners. He served three terms and left office in 1992. There are currently no African Americans serving on the New Hanover County Board of County Commissioners.

30. Since 1981, New Hanover County has been represented by eleven white representatives and one African American representative, Thomas Wright, who was first elected to represent a district that included a portion of New Hanover County in 1992. A listing of the names, district, race and years elected for these representatives is attached as Exhibit S.

V. PENDER COUNTY

31. Pender County is located in southeastern North Carolina and encompasses approximately 875 square miles. The county is a combination of primarily rural inland areas and resort-vacation areas along the coast and on the Atlantic barrier islands.

32. According to the 2000 Census, Pender County had a population of 41,082 people.

33. Pender County was created in 1875 as a result of Reconstruction politics. Prior to 1875, the area now comprising Pender County was part of New Hanover County. During Reconstruction, Republicans, who allied themselves with the local African American population, exerted increasing influence in Wilmington

and New Hanover County. Conservatives, who controlled the General Assembly, sought to isolate and limit the influence of Republicans and African Americans in New Hanover County by taking the northern two-thirds of the county, which included almost all of New Hanover's agricultural population, and formed that area into Pender County, named for Confederate General William D. Pender. This reduced New Hanover County to an area comprised of little more than the City of Wilmington and, at that time, an almost uninhabited peninsula.

34. Since its inception, Pender County has been governed by a Board of County Commissioners comprised of five members. At least since 1982, the county has been divided into five districts for purposes of electing the five commissioners. Currently, and at least since 1996, while each commissioner resides in and has been elected through partisan races from individual districts, all elections for county commissioners have been county-wide elections. Commissioners are currently elected for four year terms; terms for the five members are staggered. Three of the current five members of the Board of County Commissioners elected in the 2004 elections are Democrats, while two are Republicans.

35. Since 1954, three African Americans have been elected to serve as county commissioners in Pender County. They are: Willie Nixon (District 1,

1980-1992); Bonnie Parker (District 3, 1982-1986/1990-1994); and Cleveland Simpson (District 3, 1994-2000). One additional African American, James Faison, Jr., was appointed to serve in Mr. Simpson's position fr: a February 2000 until December 2000 following Mr. Simpson's resignation from office. Mr. Faison ran for the seat himself in the 2000 election but was defeated. There are currently no African Americans serving on the Pender County Board of County Commissioners.

36. Since 1981, Pender County has been represented by seven white representatives and one African American representative, Thomas Wright, who was first elected to represent a district that included a portion of Pender County in 1992. A listing of the names, district, race and years elected for these representatives is attached as Exhibit S.

VI. ECONOMIC, HEALTH AND EDUCATION DISPARITIES

37. The United States Census Bureau publishes a Profile of General Demographic Characteristics (Table DP-1), a Profile of Selected Social Characteristics (Table DP-2), a Profile of Selected Economic Characteristics (Table DP-3) and a Profile of Selected Housing Characteristics (Table DP-4) for various geographic regions using data from the 2000

Census. These profiles describe the disparities between majority and minority populations in various categories. Tables DP-1, DP-2, DP-3 and DP-4 for Pender County are attached as Exhibit T. Tables DP-1, DP-2, DP-3 and DP-4 for New Hanover County are attached as Exhibit U.

38. The North Carolina State Data Center, a consortium of state and local agencies established in cooperation with the US Bureau of the Census to provide the public with data about North Carolina and its component geographic areas publishes various profiles regarding economic, health and education data for various geographic regions using data derived from the 2000 Census and provided by the United States Census Bureau. These profiles describe the disparities between majority and minority populations in various categories. Primary Profiles 4, 6, 10, and 11; Housing Profiles 3 and 4; Income Profile 4; Employment Profile; Disability Profiles 4-6 and Poverty Profiles 1-6 for Pender County are attached as Exhibit V. Primary Profiles 4, 6, 10, and 11; Housing Profiles 3 and 4; Income Profile 4; Employment Profile; Disability Profiles 4-6 and Poverty Profiles 1-6 for New Hanover County are attached as Exhibit W.

39. The North Carolina Department of Health and Human Services State Center for Health Statistics has published various summaries of pregnancy healthcare and neonatal healthcare, neonatal and

infant mortality and related statistics for North Carolina's 100 counties, as well as a summary of 1999-2002 North Carolina Race-Specific and Sex-Specific Age-Adjusted Death Rates for each county. These reports and summaries describe the disparities between majority and minority populations in various categories. Copies of these reports and summaries are attached as Exhibit X.

40. The North Carolina Governor's Office, in conjunction with the North Carolina State Board of Education, using data obtained from school, district, and state levels compile a NC School Report Card each year. The report card includes the results of the End-of-Grade testing across school, district, and state levels. The report card for New Hanover County indicates that 70.6 percent of African-American students passed both the reading and math components of the ABC's End-of-Grade Tests; 74.0 percent of African-American students passed both components in Pender County. The ABC Report Cards for New Hanover and Pender counties are attached as Exhibit Y.

41. The Accountability Services Division of the N.C. Department of Public Instruction also keeps track of SAT scores of North Carolina students. Statistics are reported in The North Carolina SAT Report. Upon contacting the department, individual system statistics are available. In New Hanover County, the

mean SAT scores for Black students in 2004 was 856. The mean SAT score for Black students in Pender County in 2004 was 853.

42. The North Carolina State Data Center maintains a web-based database called LINC ("Log into North Carolina") at http://linc.state.nc.us/, which contains data derived from the 2000 Census. "LINC Topic Report: Decennial Census – Education" for New Hanover County, taken from the LINC website, is attached as Exhibit Z. "LINC Topic Report: Decennial Census – Education" for Pender County, taken from the LINC website, is attached as Exhibit AA.

43. The North Carolina Department of Public Instruction monitors and maintains reports on Adequate Yearly Progress ("AYP") for schools and school systems throughout North Carolina. These reports are available at http://ayp.ncpublicschools.org/, and they contain data concerning grade level proficiencies in mathematics and writing for grades 3 through 8 and grade 10. The 2004 AYP Report for New Hanover County is attached as Exhibit BB. The 2004 AYP Report for Pender County is attached as Exhibit CC.

VII. PUBLIC RECORD MATERIALS ON DISENFRANCHISEMENT, DISCRIMINATION AND RACIALLY POLARIZED VOTING

44. Attached as Exhibit DD is a compendium of documents from the public record that were submitted to and considered by the General Assembly when it undertook Congressional redistricting in 1997 and the United States Department of Justice when it precleared the 1997 Congressional Redistricting Plan. These materials were also presented to and considered by the three-judge court in the *Shaw* litigation in support of Congressional District 1, which was drawn to comply with § 2 of the Voting Rights Act. These documents, which include laws and practices designed to discourage or prevent minority citizens from voting as well other racially discriminatory laws in North Carolina's history, concern the lingering effects of racially discriminatory laws, racially polarized voting and racial attitudes in North Carolina.

VIII. EVIDENTIARY STIPULATIONS

45. The parties stipulate to the authenticity of all exhibits attached hereto.

46. The parties stipulate that defendants' expert, Dr. Kerry L. Haynie, whose testimony is offered in deposition form, is an expert in political science in the

area of substantive and descriptive representation by minority representatives.

47. The parties stipulate that defendants' expert, Dr. Richard L. Engstrom, whose testimony is offered in deposition form, is an expert on racially polarized voting, including the methodology and evaluation by statistical analysis to determine whether racially polarized voting exists.

This, the 27th day of April, 2005.

/s/Carl W. Thurman
Carl W. Thurman, III
Pender County Attorney
N.C. State Bar No. 17106
3169 Wrightsville Ave.
Wilmington, North Carolina 28403
Telephone: 910.763.7487
Facsimile: 910.763.7476
Cwtiii@aol.com
Counsel for the Plaintiffs

ROY COOPER
Attorney General

By: /s/Alexander McC. Peters
Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119
tsmiley@ncdoj.com

Alexander McC. Peters
Special Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.com

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: 919.716.6900
Facsimile: 919.716.6763

Counsel for the Defendants

PETITIONER'S BRIEF

94

(9)

No. 07-689

FILED
JUN 10 2008
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SUPREME COURT, U.S.

In the
Supreme Court of the United States

GARY BARTLETT, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR THE PETITIONERS

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

*Counsel of Record

June 2008

930 A 551

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Gary Bartlett in his official capacity as Executive Director of the North Carolina State Board of Elections; Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn and Charles Winfree, in their official capacities as members of the State Board of Elections; Joe Hackney in his official capacity as Speaker of the North Carolina House of Representatives; Marc Basnight, in his official capacity as President Pro Tempore of the North Carolina Senate; Michael Easley, in his official capacity as Governor of the State of North Carolina; and Roy Cooper, in his official capacity as Attorney General of the State of North Carolina.

The respondents are Dwight Strickland, David Williams and Stephen Holland.

Pender County, F.D. Rivenbark and Eugene Meadows were among the plaintiffs in the action below and originally appealed to the North Carolina Supreme Court from the entry of summary judgment against them. These three plaintiffs later withdrew their Notice of Appeal.

Joe Hackney, as the current Speaker of the North Carolina House of Representatives, is the successor in office to James B. Black and Richard T. Morgan who were sued in their official capacities.

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U.S. Census Bureau, *Plans and Rules for Taking the Census* (Aug. 9, 1999) (www.census.gov/population/www/censusdata/resid_rules.html#Students) 42

U.S. Dep't of Justice, *Section 5 Objection Determinations* (www.usdoj.gov/crt/voting/sec_5/nc_obj2.htm) 5

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (Pet. App. 1a-50a) is reported at *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007). The partial summary judgment order (Pet. App. 51a-105a) and final judgment (Pet. App. 106a-120a) of the three-judge panel of the Superior Court are unreported.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on August 24, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act ("VRA"), Pub. L. No. 89-110, Title I, § 2, 79 Stat. 437 (1965), as amended, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances,

> it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

STATEMENT

A. Factual Background

1. The North Carolina General Assembly consists of a House of Representatives and a Senate. The House of Representatives has 120 members elected to two-year terms. N.C. Const. art. II, §§ 1, 4; Pet. App. 58a. Although 22.1% of the voting-age population of

North Carolina is African-American,[1] the House historically has included few African-American members. At the time of the 1980 census, only 3 representatives (2.5% of the total) were African-American. During the 1980s, the number of black representatives grew to 14 (11.7% of the total). As a result of redistricting in the 1990s, that number rose as high as 18 (15.0% of the total).[2] Pet. App. 59a-60a.

In 1991, the United States Department of Justice faulted the General Assembly for its failure to draw any single-member districts in the southeastern part of the State with a sufficient concentration of black voters to enable them to elect candidates of their choice.[3] J.A. 68 (Wright Aff. ¶ 3). In response, the

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[1] Voting-age population figures are derived from the 2000 census. The State of North Carolina maintains a statistical database called Log Into North Carolina (LINC), at www.linc.state.nc.us.

[2] Currently, the House has 20 black representatives (16.7% of the total).

[3] The eight counties that comprise southeastern North Carolina have a total population of approximately 600,000 based on the 2000 census. Thus, the area has enough population for nine House Districts and four Senate districts. Although blacks comprise 22% of the population of this eight county area, the only district in which blacks have the ability to elect their candidate of choice is House District 18 – the current version of the district that was

General Assembly adopted a redistricting plan that created a majority-minority House district in southeastern North Carolina. The district covered portions of four counties, including Pender and New Hanover Counties, and had an African-American voting-age population of 55.7%. Pet. App. 61a. In 1992, voters in the new district elected Thomas E. Wright as the first and only African-American representative in southeastern North Carolina since Reconstruction. Representative Wright won re-election in that district in 1994, 1996, 1998, and 2000. *Id.* at 61a, 114a; J.A. 41-42 (Alexander Aff. ¶ 9).

2. Following the 2000 census, the General Assembly adopted two initial redistricting plans that were struck down by the North Carolina Supreme Court on state constitutional grounds. *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). The North Carolina Constitution provides that "no county shall be divided" in the formation of state House and Senate districts. N.C. Const. art. II, §§ 3(3), 5(3).[4] The court acknowledged that strict

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originally formed in response to the concerns of the United States Department of Justice.

[4] In 1968, in response to *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831 (1966), the North Carolina Constitution was amended to add the Whole County Provisions. These amendments were not submitted

compliance with the Whole County Provisions was "impossible" in light of the VRA and the "one-person, one-vote" requirement. *Stephenson I*, 562 S.E.2d at 396. But it concluded that "[t]he intent underlying the [provisions] must be enforced to the maximum extent possible," and held that the legislature could draw district lines that traverse county boundaries "only to the extent necessary" to comply with federal law. *Id.* at 397. The court rejected the initial redistricting plans as constitutionally deficient under that framework. *Stephenson II*, 582 S.E.2d at 314. The 2002 elections were conducted using an interim map devised by the trial court. The interim plan maintained this district (District 18) as a Section 2 district with an African-American population of less than 50%. Pet. App. 68a; J.A. 68-70 (Wright Aff. ¶¶ 4, 5).

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for preclearance under the Voting Rights Act until 1981. On November 30, 1981, the United States Department of Justice interposed an objection to the Whole County Provisions pursuant to Section 5. These provisions were therefore deemed to have no force or effect. *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). Following a review of the North Carolina Supreme Court's opinion in *Stephenson I*, the Department of Justice withdrew its objection to the Whole County Provisions on July 12, 2002. *See* U.S. Dep't of Justice, *Section 5 Objection Determinations* (available at www.usdoj.gov/crt/voting/sec_5/nc_obj2.htm).

In 2003, the General Assembly undertook a third effort to redraw the boundaries of state House Districts, including the district which had elected Representative Wright. By the time of the 2000 census, the black voting-age population in that district had fallen below 50%, and this Court's decision in *Shaw v. Hunt*, 517 U.S. 899 (1996), had prompted concerns about the district's shape. Pet. App. 61a, 65a. Unable to maintain a geographically compact majority-minority district, the General Assembly nonetheless was obligated under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to afford African-American voters an equal opportunity to elect representatives of their choice. It therefore adopted a plan that made this District more compact, while maintaining an adequate concentration of black voters to comply with Section 2 of the VRA. J.A. 38-40 (Alexander Aff. ¶¶ 3,4); J.A. 71 (Wright Aff. ¶ 7). Under the plan, District 18 has a total black population of 42.9%, a black voting-age population of 39.4%, and a population in which 53.7% of registered Democratic voters are black. Pet. App. 69a.

3. Because the border of District 18 crosses the boundary between Pender and New Hanover Counties, the district can only comply with the state constitution, as construed in *Stephenson*, if crossing county lines is necessary to comply with federal law or one-person, one-vote requirements. The General Assembly concluded that the revised configuration of

District 18 was necessary to comply with Section 2 of the VRA. J.A. 40, 43-44 (Alexander Aff. ¶¶ 6, 13-14).

Several considerations supported that judgment. First, historical election results in North Carolina show that House districts with a black voting-age population that is comparable to House District 18 "can provide an effective opportunity for the election of black candidates." J.A. 40-41 (Alexander Aff. ¶ 7). Districts with lower concentrations of black voters have generally not elected black candidates. For example, in 2004, House District 32, a district with a black voting-age population slightly less than House District 18, elected a white candidate, despite a strong challenge by an African-American candidate in the Democratic primary. *See* J.A. 109 (Second Wright Aff. Attach. A).[5] District 18 has a total black population of 42.9% and a black voting-age population of 39.4% – percentages that are above the historical levels necessary to give black voters an opportunity to elect their candidate of choice. The General Assembly determined that the best single-county alternative district would have had a "significantly lower" concentration of black voters. *Id.* at 73 (Wright Aff. ¶ 11); *accord* J.A. 42-43 (Alexander Aff. ¶ 11).

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[5] North Carolina election results are available at http://www.sboe.state.nc.us/content.aspx?id=69 ("Election Results"). The race of individual candidates can, in most cases, be determined from voter registration records.

Second, taking into account party primary results, districts with black Democratic registration as low as 52.6% had previously elected black representatives. J.A. 40-41 (Alexander Aff. ¶ 7). In numerous districts, black candidates who win the Democratic primary consistently prevail in the general election because of a small but predictable level of cross-over voting by members of the racial majority. *See* Pet. App. 70a; J.A. 123-26 (Engstrom Rept. Tbls. 1-2). In District 18, registered Democrats outnumber Republicans by a 2-to-1 margin, and 53.7% of registered Democrats are black, a level that had proven sufficient for blacks to elect candidates of their choice. Pet. App. 70a. The General Assembly found that the best single-county alternative district, by contrast, would have reduced black Democratic registration "below the levels that have in the past successfully provided black citizens in North Carolina an opportunity to elect their candidate of choice." J.A. 42-43 (Alexander Aff. ¶ 11); *see* J.A. 73 (Wright Aff. ¶ 11).

Third, District 18 has in fact consistently elected the candidate of choice of African-American voters. In 2004, Representative Wright defeated another black Democrat to secure his party's nomination, and went on to defeat a Republican challenger in the general election with 64% of the vote.[6] In 2006, Representative

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[6] The three-judge panel below incorrectly stated that Representative Wright ran unopposed in 2004. Pet. App. 98a.

Wright defeated a white Democrat in the primary, and again won the general election with 64% of the vote. In the 2008 primary, *all three* Democrats running in the party primary were African-American.[7] It is undisputed that District 18 as presently constituted has consistently elected the candidate of choice of black voters. Pet. App. 70a.

B. Procedural Background

1. In 2004, respondents brought an action in state court alleging that District 18 violated the North Carolina Constitution, as construed in *Stephenson I*.[8] Petitioners answered that it was necessary to cross county lines when drawing District 18 to comply with Section 2 of the VRA. Pursuant to state law, the redistricting challenge was referred to a three-judge panel. Pet. App. 6a; N.C. Gen. Stat. § 1-267.1(b).

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[7] Representative Wright was expelled from the House on March 20, 2008. Following his expulsion, an African-American (Sandra Spaulding Hughes), favored by African-American voters, prevailed in the Democratic primary for House District 18. Hughes has been appointed to fill the unexpired term for this office.

[8] Pender County and its commissioners, in their official capacity, originally were among the plaintiffs. The three-judge panel determined that the county lacked standing to sue state officials, and the county did not appeal that determination. Pet. App. 7a.

The panel recognized that a vote dilution claim under Section 2 must satisfy the three preconditions identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under *Gingles*, a plaintiff must show: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. The parties filed cross-motions for summary judgment, focusing on the first *Gingles* precondition. Respondents took the position that Section 2 of the VRA has no application in this case because African-Americans do not constitute a numerical majority in District 18.

The three-judge panel unanimously rejected the contention that a vote dilution claim under Section 2 depends on a concentration of minority voters above 50%. The panel held that the first *Gingles* precondition "depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district." Pet. App. 93a. Based on the text of Section 2, the panel determined that the critical question is whether minority voters form "a *de facto* majority that can elect candidates of their own choosing," considering the totality of circumstances and not "sheer numbers alone." *Id.*

Based on the undisputed evidence, the three-judge panel granted petitioners' motion for partial summary judgment on the first and second *Gingles* preconditions. It described District 18 as an "ability to elect" or "coalition" district in which African-American voters "'are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their own choice.'"[9] Pet. App. 90a (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003)). The panel accepted petitioners' uncontradicted evidence that past election results demonstrate that districts with a black voting-age population comparable to House District 18 "can provide an effective opportunity for the election of black candidates." *Id.* at 97a. It also agreed that "a more

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[9] Consistently throughout this litigation, the State has contended that District 18 constitutes a "coalition" district (also referred to as a "crossover" district or "ability to elect" district) in which the minority group may elect its candidate of choice as a result of being joined by predictably supportive voters from outside the minority group. In contrast to a "coalition" district, an "influence" district arises when a minority group has "the ability to influence the outcome between some candidates, none of whom is their candidate of choice." *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006) (plurality opinion). The State has not asserted and does not assert that District 18 is protected under Section 2 of the Voting Rights Act as an "influence" district.

important indicator of effective black voting strength is the percentage of registered Democrats who are black." *Id.* Noting that District 18 has a black voting-age population of 39.4% and that 53.7% of registered Democrats are black in a district where Democrats comprise "an overwhelming majority," the panel concluded that "it is not rocket science" to see how black voters can elect their candidate of choice. *Id.* The panel pointed to actual election results in District 18 as proof that a black Democrat stood the best chance of winning election. *Id.* at 97a-98a.

Noting that respondents had not challenged any of petitioners' evidence,[10] *id.* at 98a, the panel held that the first *Gingles* precondition was satisfied as a matter of law, *id.* at 99a. The court further held that the second *Gingles* precondition was also satisfied, *id.*, but concluded that there may exist genuine issues of material fact concerning the third *Gingles* precondition, *id.* at 100a.

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[10] The parties had provided the court with extensive stipulations and exhibits regarding the history of race discrimination in Pender and New Hanover Counties and its lingering effects. J.A. 131-50. In fact, Pender County, which was originally part of New Hanover County, was formed in 1875 as a result of Reconstruction politics in order to isolate Republicans and African-Americans within the southern portion of New Hanover County from the remainder of the county. J.A. 143-44. Pender County is named after Confederate General William D. Pender. *Id.*

2. Following the panel's ruling, respondents agreed to detailed factual stipulations, and further agreed that there remained no genuine issue as to any material fact. *Id.* at 128a-131a. Among other things, respondents stipulated that petitioners had presented evidence "sufficient to support a finding of fact that the African-American populations in Pender and New Hanover counties are politically cohesive" and that "racially polarized voting exists in Pender and New Hanover counties so that African-American candidates usually are overwhelmingly the choice of African-American voters, but are not the choice of non-African-American voters." Pet. App. 129a-30a. They further stipulated "that the evidence presented by [petitioners] is sufficient to support a finding of fact that the racial difference in the preference of voters results in the white majority voting sufficiently as a block to usually enable it to defeat the minority's preferred candidate." *Id.* at 130a. Respondents informed the panel that they did "not wish to be heard further or to present evidence" on any remaining issue. *Id.*

Based on those stipulations, the three-judge panel held that petitioners had satisfied all three *Gingles* preconditions, and that "House District 18 was required to be drawn as it was in order to provide the African-American minority in Pender and New Hanover Counties . . . [with] an equal opportunity to elect a representative . . . of their choice as required by Section 2 of the VRA." Pet. App. 116a. The court concluded that District 18 "complies, to the maximum

extent practicable, with the legal requirements of the [Whole County Provisions] as established in *Stephenson I*." *Id.* at 117a.

3. The North Carolina Supreme Court, in a divided opinion, reversed the three-judge panel. The court emphasized that "[o]nly the first *Gingles* precondition is at issue in this appeal." Pet. App. 14a. The court explained that it faced only the "narrow question" whether the first *Gingles* precondition "requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." *Id.* Respondents raised no challenge concerning the remaining *Gingles* preconditions, and the court accepted the undisputed evidence—not challenged on appeal—that past election results in North Carolina had shown that a House district, with a black voting-age population of 38.4%, "creates an opportunity to elect African-American candidates." *Id.* at 5a. Accordingly, the sole issue before the North Carolina Supreme Court was "whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (i.e., greater than 50 percent)." *Id.* at 14a.

Citing the need for a "bright line rule," the court held that the first *Gingles* precondition requires a strict 50% numerical majority. Pet. App. 23a-24a. The court emphasized that, for ease of administration and to ensure that the rule serves as a "safe harbor" for the

legislature, no circumstances can justify deviation from the 50% rule, even at the risk of foreclosing meritorious claims. *Id.* at 24a. The court acknowledged that a strict 50% requirement raises its own set of questions. *Id.* at 15a (asking, "a 'majority' or 'minority' of *what*?"). But it held that the "proper statistic" for deciding whether a minority group forms a majority of a district is the population of voting-age citizens. *Id.* at 17a. The court proceeded to "direct" that all current legislative districts "and any future [redistricting] plans" must satisfy the 50% rule or "be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina." *Id.* at 33a. Thus, under the decision below, a district could not be drawn with a minority citizen voting-age population of 49.5% if the district crossed county lines in violation of the Whole County Provisions. Because petitioners had not shown that at least 50% of voting-age citizens in District 18 are African-American, the court held that the configuration of District 18 was not mandated by Section 2 of the VRA, and that the 2003 redistricting plan thus violated the state constitution. *Id.* at 27a.

Chief Justice Parker, in a dissent in which Justice Timmons-Goodson joined, opined that the majority had misconstrued both Section 2 of the Voting Rights Act and this Court's decision in *Gingles*. Chief Justice Parker noted that "the United States Supreme Court has not endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute

a numerical majority." Pet. App. 41a (Parker, C.J., dissenting). Chief Justice Parker concluded that such a "rigid numerical majority requirement" is inconsistent with both this Court's precedent and the intent of the Voting Rights Act. *Id.* at 42a.

SUMMARY OF ARGUMENT

The North Carolina Supreme Court construed Section 2 of the VRA to impose a bright-line rule that a minority group constituting less than a numerical majority of voting-age citizens in a proposed district can never bring a Section 2 vote dilution claim. The court erred in adopting that unbending 50% rule. A minority group that is sufficiently large to elect candidates of its choice by forming a coalition with a limited number of other voters, but that would be deprived of that opportunity by a State's districting plan, is not categorically barred from bringing a Section 2 vote dilution claim.

This Court's cases do not impose a 50% rule. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court established three preconditions for a Section 2 claim, the first of which requires minority voters to show that they could constitute a majority in a proposed district. *Id.* at 50. *Gingles*, however, reserved the question whether a minority group could establish a Section 2 vote dilution claim when it is sufficiently large to elect candidates of its choice in a proposed district with the aid of some crossover votes.

The Court has since repeatedly reserved that question. Moreover, the Court in *Johnson v. De Grandy*, 512 U.S. 997 (1994), reformulated the first *Gingles* precondition to require a minority group challenging a districting plan to show that it is "sufficiently large . . . to elect candidates of its choice." *Id.* at 1008. That formulation readily accommodates a claim by minority voters that they can elect candidates of their choice with limited crossover voting when a State's districting plan deprives them of that opportunity.

The text of Section 2 imposes an opportunity-to-elect precondition, not a 50% precondition. Specifically, the language of Section 2 prohibits a voting practice that deprives minority voters of the "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). That statutory language requires minority voters to show that the minority group is sufficiently large and compact "to elect representatives of their choice" in an additional opportunity-to-elect district. Otherwise, minority voters would be unable to show that the districting plan is the cause of their inability to elect. Once a minority group shows that it is sufficiently large to elect representatives of its choice in an additional opportunity-to-elect district, however, the text of the statute imposes no further requirement that they also constitute a numerical majority of voting-age citizens in the proposed district.

In certain highly polarized communities, minority voters would be unable to show that they would have an opportunity to elect unless they can also show that they would constitute a numerical majority in the district. But as the Court recognized in *De Grandy*, there are other communities in which, despite racially polarized voting, a minority group can establish that it is sufficiently large to elect its preferred candidates with the aid of limited crossover voting. In such cases, the statute's first precondition is satisfied.

House District 18 is an example of such a district. Indeed, in the two elections held in that district, minority voters have elected their candidate of choice. Rejecting a Section 2 claim in such circumstances on the sole ground that minority voters fail to constitute a numerical majority in the district would replace the opportunity-to-elect precondition established by the language of the statute with an extra-textual, policy-based screening device.

The 50% rule is also at odds with the totality-of-circumstances test prescribed by the statutory terms. To attribute dispositive significance to a single factor, such as the minority population in a district, while ignoring all other evidence bearing on whether minority voters have been deprived of equal electoral opportunity, is the very antithesis of a totality-of-circumstances test.

The 50% rule also creates disharmony between Section 2 and Section 5. In *Georgia v. Ashcroft*, 539

U.S. 461 (2003), all nine Justices agreed that a court should consider both safe majority-minority districts and coalition districts in deciding whether a new plan diminishes the preexisting ability of minority voters to elect candidates of their choice. The 2006 amendment to Section 5 codifies that consensus by prohibiting any retrogression in the "ability" of minority voters "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b).

While Section 2 and Section 5 differ in important respects, they share a common purpose of protecting minority voters against practices that dilute their opportunity to elect representatives of their choice. In light of that common purpose, there is no reason that the Section 5 ability-to-elect inquiry should consider the effect of both majority-minority districts and coalition districts, while the Section 2 opportunity-to-elect standard should focus exclusively on the former.

The 50% rule stands at odds with the ultimate objective of the Voting Rights Act of minimizing the role of race in politics. That rule puts indirect pressure on States to create majority-minority districts even when they are not necessary to provide minority voters with an opportunity to elect representatives of their choice. The result is to inject race into redistricting more than is necessary to achieve Section 2's remedial objectives, and also to diminish a State's discretion to pursue other legitimate redistricting objectives.

Creating majority-minority districts when they are not necessary to provide minority voters with an opportunity to elect candidates of choice can also entrench the very polarized voting patterns Section 2 seeks to ameliorate. Coalition districts, by contrast, can promote a hastening of the end of polarized voting patterns. *See De Grandy*, 512 U.S. at 1020.

The 50% rule also leaves a significant gap in Section 2's protection against districting plans that dilute minority voting strength. Under that rule, a jurisdiction could pack as many minority voters as possible into a district that is already a safe majority-minority district in order to prevent minority voters from electing their candidates of choice in surrounding coalition districts. Or if minority voters are electing candidates of their choice in a coalition district, a jurisdiction could respond by fragmenting minority voters into multiple districts in which they lack the opportunity to elect candidates of their choice. As long as the minority voters could not constitute a numerical majority in a district, a jurisdiction would have carte blanche to dilute their opportunity to elect candidates of their choice. Because the 50% rule conflicts with the text, history, and purposes of Section 2, the Court should reject that rule.

ARGUMENT

A Minority Group That Constitutes Less Than A Numerical Majority Of Voting-Age Citizens In A Proposed District, But That Can Elect Its Candidates Of Choice In That District, Is Not Categorically Barred From Bringing A Section 2 Vote Dilution Claim

The North Carolina Supreme Court held that a minority group that constitutes less than a numerical majority of voting-age citizens in a proposed district can *never* establish a Section 2 vote dilution claim. Based on this unbending 50% rule, a showing by an under-50% minority group that it is sufficiently large to elect candidates of its choice in a proposed district is always irrelevant. It makes no difference how close to a numerical majority the minority group would be, how little crossover voting the minority group would need to elect candidates of choice, or how overwhelming the evidence is that the minority group could elect its preferred candidates. The single fact that the minority group could not constitute a numerical majority in a district would be fatal to its Section 2 vote dilution claim.

The North Carolina Supreme Court's ruling constitutes a blanket directive that the 50% rule shall be applied to the current and all future redistricting plans: "Any legislative district designated as a Section 2 district under the current redistricting plans, and any future plans, must either satisfy the [50%]

numerical majority requirement . . . , or be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina . . . ." Pet. App. 33a. Under the court's decision, the state legislature is foreclosed from maintaining or creating a single under-50% opportunity district in order to comply with Section 2, unless it can do so without crossing county lines.

The court's decision has far-reaching consequences for both the state legislature and for minority voters. Under the court's 50% rule, if African-Americans constituted 49.5% of the citizen voting-age population in a district that crossed county boundaries and had consistently elected the candidates of their choice from that district, the state legislature would be required to dismantle the district. The legislature would be forced to take that action even if there were no way to reconfigure the district to afford African-Americans an opportunity to elect their preferred candidates, and even if that district were the only one in a particular region of the State in which African-Americans had an opportunity to elect candidates of their choice.

That interpretation of Section 2 is incorrect. A minority group that is sufficiently large to elect candidates of its choice through a coalition with a limited number of other voters, but would be deprived of that opportunity in the state's districting plan, is not categorically barred from bringing a Section 2 vote dilution claim. Section 2 does not require a court to

blind itself to the reality of vote dilution simply because a minority group does not constitute a numerical majority in a district.

I. This Court's decisions do not impose a 50% rule

Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that . . . [members of a protected] class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Section 2's prohibition against voting practices that deny minority voters an "opportunity . . . to elect representatives of their choice" protects minority groups against districting plans that dilute their voting strength. A districting plan can dilute minority voting strength in two ways: by fragmenting minority voters among several districts where a bloc-voting majority can usually defeat them, or by packing minority voters into one or a small number of districts to minimize their opportunity to elect candidates in other districts. *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court set out three preconditions for bringing a Section 2 vote dilution claim: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the white majority must vote "sufficiently as a bloc . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. While *Gingles* involved a challenge to multimember districts, those three preconditions also apply to claims concerning single-member districts. *De Grandy*, 512 U.S. at 1006.

Seizing on the literal language of the first precondition, the North Carolina Supreme Court held that *Gingles* forecloses any claim in which the minority group is unable to show that it would constitute a numerical majority of the citizen voting-age population in a proposed district. Pet. App. 33a. *Gingles*, however, expressly reserved the question whether a Section 2 claim can be brought when the minority group "is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12.

In a concurring opinion, Justice O'Connor, joined by three other Justices, endorsed such a claim in circumstances in which minority voters can elect their candidates of choice with limited crossover voting. She explained that when a minority group is not sufficiently large to constitute a numerical majority,

but the group can establish that limited white crossover voting would occur "to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice." *Id.* at 90 n.1 (O'Connor, J., concurring).

Since the decision in *Gingles*, the Court has repeatedly left open the question whether a minority group can bring a coalition district claim when it is sufficiently large to elect candidates of its choice with limited crossover votes, but a State's districting plan, through fragmentation or packing, deprives them of that opportunity. *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993); *De Grandy*, 512 U.S. at 1008-09; *League of United Latin American Citizens v. Perry* ("*LULAC*"), 126 S. Ct. 2594, 2624 (2006).

In *Voinovich*, the Court explained that *Gingles* had addressed the requirements for a claim in which minority voters allege that they "have been deprived of the ability to constitute a *majority*," and had not resolved whether the first precondition should be "modified or eliminated" when minority voters claim that they have been deprived of the opportunity to be a "sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority." 507 U.S. at 158. The Court declined to decide that issue in *Voinovich* because the plaintiffs

failed to satisfy *Gingles*' third precondition of white bloc voting.

In *De Grandy*, the Court once again reserved that issue, this time because the plaintiffs failed to establish a Section 2 violation under the totality of circumstances. 512 U.S. at 1009. Significantly, however, the Court reformulated the first *Gingles* precondition in a way that readily accommodates a coalition district claim. Instead of describing the first *Gingles* precondition as requiring proof that minority voters could constitute a majority in a district, the Court in *De Grandy* stated that "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* precondition requires the possibility of creating more than the existing number of reasonably compact districts with *a sufficiently large minority population to elect candidates of its choice*." 512 U.S. at 1008 (emphasis added). The *De Grandy* Court also recognized that minority voters could elect candidates of their choice in coalition districts without constituting a numerical majority in the district, explaining that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of choice." *Id.* at 1020.

In *LULAC*, a plurality of the Court concluded that Section 2 does not protect the right of minority voters to influence elections between candidates who are not

their candidates of choice. The plurality stated that "the opportunity to elect representatives of their choice . . . requires more than the ability to influence the outcome between some candidates, none of whom is the candidate of choice." 126 S. Ct. at 2625. The plurality distinguished that claim, however, from a coalition district claim in which the plaintiffs show that "they constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Id.* at 2624. Assuming without deciding that Section 2 can "accommodate this claim," the plurality concluded that plaintiffs had failed to prove that they could elect the candidate of their choice in the district at issue. *Id.*

This Court's cases thus leave open the question whether plaintiffs who do not constitute a numerical majority in a district are categorically barred from bringing a Section 2 claim. For the reasons that follow, the Court should now hold that a numerical majority in a district is not an invariable requirement for a Section 2 vote dilution claim.

II. The text of Section 2 imposes an opportunity-to-elect precondition, not a 50% rule

The text of Section 2 prohibits a districting plan that gives minority voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). That statutory language "says nothing about majority-minority districts." *Voinovich*,

507 U.S. at 155. Instead, it asks whether a minority group, of whatever size, has been deprived of an opportunity to elect candidates of choice.

That statutory standard necessarily requires minority voters challenging a districting plan to establish that they would have an "opportunity . . . to elect" candidates of their choice in at least one additional district. *De Grandy*, 512 U.S. at 1008; *LULAC*, 126 S. Ct. at 2654-55 (Roberts, C.J., concurring in part and dissenting in part). Absent such a showing, plaintiffs cannot establish that the districting plan is responsible for their inability to elect representatives of their choice. *See Gingles*, 478 U.S. at 50 n.17. Once minority voters show that they would have the opportunity to elect representatives of their choice in an additional district, however, the first precondition for a vote dilution claim has been satisfied. Nothing in the language of Section 2 supports a further requirement that minority voters also establish that they would constitute a numerical majority in the district.

There are some communities in which racial polarization is so severe that minority voters can establish that they would have an opportunity to elect candidates of their choice only by showing that they could constitute a numerical majority in a proposed district. But as the Court recognized in *De Grandy*, there are other communities in which, despite polarized voting, minority voters can elect candidates

of their choice by forming coalitions with a limited number of other voters. In such cases, the first precondition for a vote dilution claim would be satisfied, and invoking the 50% rule to foreclose a plaintiff's claim would lack any textual justification.

For example, as the United States has explained, Section 2's opportunity-to-elect precondition can be satisfied when minority voters show that they would constitute slightly less than 50% of the voters in a proposed district, but can nonetheless elect candidates of their choice with the assistance of a small amount of crossover voting. Br. for U.S. as *Amicus Curiae* at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 528 U.S. 1114 (No. 98-1987). Such a showing can be made, the United States observed, when minority voters introduce evidence that they would have constituted 48% of the voters in a proposed district and that they had elected candidates of their choice in a district having a comparable minority percentage. *Id.* at 13-14.

Similarly, as the United States has recognized, the first precondition can also be satisfied where minority voters would constitute a somewhat lower percentage of the voting-age population. Section 2, after all, no more contains a near-50% rule than it contains a 50% rule. For example, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), while minority voters could have constituted 44%-46% of the voters in a district, the

county deliberately divided minority voters between two districts in which they constituted 23% of the voters. As the United States explained, by deliberately depriving minority voters of the opportunity to elect representatives of their choice with the assistance of the limited crossover voting that could be expected, the county violated the plain language of Section 2. *See* Br. for U.S. in Opp. at 21-22, *County of Los Angeles v. Garza* (Nos. 90-849 & A-422).

House District 18 is another example of a district in which minority voters, although constituting less than a majority of the voting-age population, can elect representatives of their choice. The clearest evidence of that is the results of the two elections held in that district since its creation. In both elections, African-Americans elected their candidate of choice. *See* Pet. App. 70a.

Experience in other House Districts in North Carolina provides further evidence of the opportunity of African-Americans to elect candidates of their choice in House District 18. In ten districts having comparable population characteristics (more than 38.4% in African-American voting-age population), African-American voters have elected candidates of their choice. Pet. App. 5a, 97a; J.A. 40-41 (Alexander Aff. ¶ 7). That is consistent with experience in other States, where minority voters often are able to elect representatives of their choice when they are close to 40% of the voting-age population in the district. *See* J.

Morgan Kousser. *Beyond* Gingles*: Influence Districts & the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-68 (Spring 1993).

Other objective characteristics of the district strengthen the conclusion that House District 18 is a coalition district in which African-Americans have an opportunity to elect candidates of their choice. In particular, African-Americans constitute 53.7% of the voters who are registered as Democrats in that district, and more than 59% of the voters in the district are registered as Democrats. Pet. App. 70a. Those figures support the reasonable inference that African-Americans can control the party nomination and can then obtain sufficient crossover voting in the general election to elect the candidate of their choice. *See LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) (first *Gingles* precondition can be satisfied when "minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election").

Moreover, African-Americans constitute more than 39% of the voting-age population in the district. Pet. App. 97a. At that percentage, African-Americans are more than three times the size of the 11% crossover group that is necessary for a coalition between African-Americans and crossover voters to constitute more than 50% of the voters in the district. That evidence

is a further objective indicator that African-Americans can elect their candidates of choice rather than merely assist another larger group in electing candidates who are preferred by that group, but not by African-Americans. *See LULAC*, 126 S. Ct. at 2624-25 (plurality opinion) (African-Americans constituting 25.7% of the citizen voting-age population could not elect candidates of their choice but could only assist in electing the candidates preferred by others).

Evidence that so plainly establishes that minority voters can elect candidates of their choice in a district where they are less than 50% of the voting-age population satisfies the first precondition for a Section 2 claim. To reject such a claim based on a failure to satisfy a mechanical 50% rule would substitute an extra-textual, policy-based screening device for the opportunity-to-elect precondition that is established by the language of the statute.

III. The 50% rule is inconsistent with other relevant indicators of congressional intent, including the statute's totality-of-circumstances test

The 50% rule cannot be reconciled with the remainder of Section 2's text or its legislative history. Most prominently, Section 2 provides that the judicial inquiry into whether an election practice dilutes minority voting strength must be based on the "totality of circumstances." 42 U.S.C. § 1973(b). To attribute dispositive significance to a single factor, such as the

minority voting-age population in a district, while ignoring all other evidence bearing on whether minority voters have been deprived of equal electoral opportunity, is the very antithesis of a totality-of-circumstances test.

The Court made that very point in *De Grandy* when it rejected the argument that proportional representation always defeats a Section 2 vote dilution claim. The Court explained that such "an inflexible rule would run counter to the textual command of Section 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" 512 U.S. at 1018 (quoting 42 U.S.C. § 1973(b)). The Court added that, under the totality-of-circumstances test, "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21. That reasoning is directly applicable here.

In addition, the text of Section 2 asks whether a voting practice "results" in denying minority voters equal electoral opportunity. 42 U.S.C. § 1973(a). That statutory language directs a court to focus on the actual consequences of an election practice, not on whether a formalistic rule has been satisfied.

The 50% rule also finds no support in Section 2's detailed Senate Report. That Report sets out a list of "typical" factors that are relevant in proving a Section 2 vote dilution claim. S. Rep. No. 97-417, at 4 (1982),

reprinted in 1982 U.S.C.C.A.N. 177, 206-07. Conspicuously absent from that list is any requirement that minority group members prove that they could constitute a numerical majority in a proposed district. Furthermore, while the Senate Report endorses an inquiry that depends on "a searching practical evaluation of the past and present reality," *id.* at 30, and on a "functional view of the political process," *id.* at 30 n.120, a rigid 50% rule ignores practical reality and mandates a formal rather than a functional approach.

Consistent with the text of Section 2 and the Senate Report, the other two *Gingles* preconditions – minority group cohesion and white bloc voting – involve functional inquiries that depend on an investigation into the actual voting behavior of the electorate. *Gingles*, 478 U.S. at 58-59. There is no sound reason why a similar functional approach should not be followed in deciding whether minority voters can elect candidates of their choice in a proposed district.

IV. The 50% rule creates disharmony between Section 2 and Section 5

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court held that the question whether a practice or procedure with respect to voting is retrogressive under Section 5 is not limited to deciding whether the plan reduces the number of safe majority-minority districts. The Court explained that a reduction in safe majority-

minority districts could be offset by an increase in coalition districts in which minority voters could elect candidates of their choice with limited crossover votes. *Id.* at 480-82. The Court also held that a reduction in safe minority-majority districts might be offset by an increase in influence districts where minority voters cannot elect candidates of choice but can nonetheless play a substantial role in the election process. *Id.* at 482. The dissent in *Georgia v. Ashcroft* agreed with the majority that the replacement of safe majority-minority districts with coalition districts was not necessarily retrogressive, *id.* at 492-93 (Souter, J., concurring in part and dissenting in part), but it rejected the majority's conclusion that ability-to-elect districts could be replaced by influence districts. *Id.* at 494-95. Thus, all nine Justices in *Georgia v. Ashcroft* viewed coalition districts as relevant in deciding whether a plan is retrogressive under Section 5, and none of the Justices would have limited the Section 5 retrogression inquiry to a consideration of whether the plan reduced the number of safe majority-minority districts.

With the 2006 amendment to Section 5, Congress provided that the Section 5 retrogression inquiry should focus exclusively on whether a districting plan will have the effect of diminishing a minority group's "ability . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). That amendment overrules the holding in *Georgia v. Ashcroft* allowing replacement of districts that afford minority voters the

ability to elect their preferred representatives with districts that merely afford minority voters an opportunity to influence elections. At the same time, however, the amendment's "ability . . . to elect" standard codifies the consensus of all nine Justices in *Georgia v. Ashcroft* that both safe majority-minority districts and coalition districts should be considered in deciding whether a redistricting plan diminishes a minority group's ability to elect representatives of its choice.

Section 5 and Section 2 differ in certain important respects. *See Georgia v. Ashcroft*, 539 U.S. at 478. Both statutes, however, share a common purpose of protecting minority voters against practices that dilute their ability to elect representatives of choice. *See* 42 U.S.C. § 1973c(b); 42 U.S.C. § 1973(b). In light of that common purpose, there is no reason that the Section 5 ability-to-elect inquiry should consider the effect of both majority-minority districts and coalition districts, while the Section 2 opportunity-to-elect standard should focus exclusively on whether minority voters constitute a numerical majority in a district. Nothing in the distinct language or purposes of the two provisions justifies that kind of disharmony between Section 2 and Section 5. *See LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

V. The 50% rule threatens the ultimate goal of the Voting Rights Act of minimizing the role of race in politics

The ultimate goal of the Voting Rights Act is to minimize the role of race in American politics. *Georgia v. Ashcroft*, 539 U.S. at 490-91; *De Grandy*, 512 U.S. at 1020. Adoption of a 50% rule would threaten to retard progress in achieving that goal.

The 50% rule inevitably tends to exert a measure of pressure on States to devise districts in which minority voters constitute a numerical majority even when that is not necessary to ensure that minority voters have an opportunity to elect representatives of their choice. If districts in which minority voters constitute a numerical majority are sometimes required by Section 2, while coalition districts in which minority voters have the opportunity to elect their preferred candidates are never required by Section 2, States would face a strong inducement to create the former rather than the latter. Thus, the 50% rule encourages the packing of minorities into a district when such packing is not necessary for that minority group to have an ability to elect its candidate of choice. The 50% rule therefore runs the risk of injecting race into the redistricting process more than is necessary to fulfill Section 2's remedial objective of guaranteeing equal electoral opportunity.

The Court in *De Grandy* made a similar point in rejecting the proposal to make proportionality a

complete defense to a Section 2 claim. The Court explained that such a defense would "promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. at 1019-20. That concern is equally applicable here.

The pressure to create majority-minority districts, even when they are not necessary to provide minority voters an opportunity to elect representatives of their choice, also tends to limit the flexibility of States to pursue other racially neutral redistricting objectives. If a State that would create a majority-minority district to comply with Section 2 could also comply by devising a coalition district, the State would have significantly more freedom to pursue those other neutral objectives.

In addition, when majority-minority districts are not necessary to ensure that minority voters enjoy an equal opportunity to elect their preferred candidates, but are created solely to satisfy the 50% rule, it can reduce the incentive for minority voters to form coalitions with non-minority voters. When minority voters can easily determine the outcome of elections independently, there is little incentive to form coalitions with non-minority voters. The 50% rule therefore runs the risk of promoting the entrenchment of the very polarized voting patterns that Section 2 is designed to ameliorate. By contrast, as the Court

observed in *De Grandy*, coalition districts that require minority voters to "pull, haul, and trade to find common political ground" have the potential to "hasten the waning of racism in American politics." 512 U.S. at 1020.

The 50% rule also allows blatant efforts to dilute minority voting strength to go unremedied. Under the 50% rule, a jurisdiction would be free to pack as many minority voters as possible into a district that is already a safe majority-minority district in order to prevent minority voters from electing candidates of their choice in surrounding coalition districts. Similarly, if a compact minority population is electing candidates of its choice in a coalition district, a jurisdiction could respond by fragmenting that minority population into multiple districts in which minority voters would have no opportunity to elect their preferred candidates. In *De Grandy*, the Court rejected proportionality as a complete defense to a Section 2 vote dilution claim in part because it would allow jurisdictions to engage in "blatant racial gerrymandering" to dilute minority voting strength. *Id.* at 1019-20. The Court should reject the 50% rule for the same reason.

VI. The North Carolina Supreme Court's reasons for adopting the 50% rule are unpersuasive

The North Carolina Supreme Court offered three reasons for adopting the 50% rule. None is persuasive.

First, the North Carolina Supreme Court concluded that the 50% rule would be easy to administer, while the opportunity-to-elect standard would prove difficult to administer. Pet. App. 23a, 25a. Ease of administration, however, provides no basis for adding a requirement to a statute that is inconsistent with the text and purposes of the statute. In any event, the statutory opportunity-to-elect standard can be fairly administered, while application of the 50% rule is not without its own difficulties.

Making a determination that minority voters have an opportunity to elect candidates of their choice in a proposed district is well within the capacity of courts. The third *Gingles* precondition already requires a court to determine whether whites usually vote sufficiently as a bloc to defeat "the combined strength of minority support plus white crossover votes." 478 U.S. at 56. The opportunity-to-elect precondition simply requires a court to conduct the parallel inquiry into whether the combination of minority votes plus crossover votes is likely to give minority voters an opportunity to elect their preferred candidates. Thus, the same kind of evidence that is used to prove the third *Gingles* precondition, *see* 478 U.S. at 58-59, 80-82, can be used to prove the opportunity-to-elect precondition.

Moreover, there are certain forms of objective evidence concerning the specific district at issue that can confirm that minority voters have an opportunity

to elect their preferred candidates. As previously discussed, such confirming evidence may include evidence that (1) minority-preferred candidates have already been elected in the proposed district, (2) minority voters constitute a majority of the voters in a party primary, and that party is the dominant party in the district, and (3) the minority group is significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district.

The statutory opportunity-to-elect standard is therefore judicially manageable. Indeed, in *Georgia v. Ashcroft*, this Court held that Section 5 requires courts to determine whether coalition districts afford minority voters the ability to elect candidates of their choice. 539 U.S. at 480-82. The Court would hardly have adopted that interpretation of Section 5 if it viewed the inquiry as judicially unmanageable.

At the same time, the 50% rule can raise difficult factual issues. To the extent that the 50% rule incorporates citizen voting-age population (CVAP) as a measure, there are practical difficulties in making that determination. For example, the citizenship data from the decennial census that is necessary to determine the CVAP of a proposed district is generally not available until after most redistricting is completed. *See, e.g.*, U.S. Census Bureau, *About the ACS: Data Dissemination* (Apr. 29, 2008) (available at www.census.gov/acs/www/SBasics/DataDiss/DataDis

s1.htm) (for governmental units fewer than 65,000 people, it will take three to five years to produce estimates). A court entertaining an early challenge to a plan may therefore have to make a CVAP determination without the relevant census information. In addition, CVAP census information is drawn from census block group data, rather than the more detailed data that is available for voting-age population, and that less refined information can lead to inaccurate estimates of the CVAP in a proposed district. *See* Br. for U.S. as *Amicus Curiae* in *Valdespino*, at 17.

The Census has also undercounted minorities and overcounted whites in the past. Mary Mulry, Statistical Research Division, U.S. Census Bureau, *Summary of Accuracy and Coverage Evaluation for 2000 Census* 13, 15 (Feb. 28 , 2006). And because the Census records college students as living at their college address and military personnel as living at their military base, even if they are registered to vote elsewhere, the Census figures will not accurately represent eligible voters in districts that include colleges or military bases, of which North Carolina has an abundance. *See, e.g.*, U.S. Census Bureau, *Plans and Rules for Taking the Census* (Aug. 9, 1999) (available at www.census.gov/population/www/censusdata/resid_rules.html#Students). Thus, contrary to the North Carolina Supreme Court's apparent assumption, the 50% rule does not remove all

difficulties in deciding whether a minority group can satisfy the first *Gingles* precondition.

In the end, however, what matters is not that it may be difficult in some cases to administer the extra-textual 50% rule, but that the statutory opportunity-to-elect standard can be administered. And because the opportunity-to-elect standard is both administrable and embodied in the text of the statute, there is no basis for departing from it.

The North Carolina Supreme Court also concluded that the 50% rule should be adopted to provide the state legislature with a "safe harbor" for the redistricting process. Pet. App. 24a. As discussed above, however, all the reasons the Court in *De Grandy* gave for rejecting proportionality as a safe harbor apply here.

In particular, the Court rejected proportionality as a safe harbor because it would (1) run counter to the statute's totality-of-circumstances test; (2) have a tendency to induce state legislatures to draw majority-minority districts even when that was not necessary to ensure that minority voters would have an equal opportunity to elect representatives of their choice; and (3) allow jurisdictions to engage in blatant racial gerrymanders to dilute minority voting strength. 512 U.S. at 1018-20. As previously discussed, a 50% safe harbor likewise conflicts with the totality-of-circumstances test, induces a greater use of race than is necessary, and allows jurisdictions to engage in

blatant efforts to dilute minority voting strength. The 50% rule therefore cannot be justified on the ground that it furnishes the legislature with a safe harbor.

Finally, the North Carolina Supreme Court concluded that because a coalition district claim necessarily depends on proof of some level of white crossover voting, satisfying the first *Gingles* precondition undermines proof of the third *Gingles* precondition of white bloc voting. Pet. App. 26a. That reasoning is unpersuasive.

In some circumstances, the percentage of minority voters in a district may be so low, and the dependency on white crossover so high, that proof that minority voters have an opportunity to elect their preferred representatives with the addition of a large crossover vote by white voters will simultaneously refute the possibility that there is racially polarized voting on the part of white voters. But that is simply not true of all coalition district claims.

For example, when minority voters constitute 40% of the voters in a district, they would have the potential to elect their candidates of choice even when only 20% of the white voters cast crossover votes (20% of 60% = 12%, and 40% + 12% = 52%). At the same time, if the State's plan reduced the minority percentage in the district to 35%, that same degree of white bloc voting may usually defeat the minority-preferred candidate (20% of 65% = 13% and 35% + 13% = 48%). Thus, when minority voters could constitute

approximately 40% of the voters in a district, but they constitute only 35% of the voters in the State's plan, minority voters may be able to show both that they would have an opportunity to elect candidates of their choice in a proposed district and that the State's plan deprives them of that opportunity.

In cases in which minority voters could constitute a higher percentage of the voters in a proposed district, the possibility of making both showings may be even greater. And, as the percentage of minority voters goes down, it may prove more difficult to make both showings. The crucial point therefore is that there is no basis for making a categorical judgment that all coalition district claims depend on a level of white crossover that would undermine a claim of white bloc voting.

Thus, all three reasons given by the North Carolina Supreme Court for adopting a 50% rule are without merit. Consistent with the text, history, and purposes of Section 2, the Court should reject that categorical rule.

The Voting Rights Act was designed to address past discrimination at the polls and help our society move to the point where race no longer matters. *See Georgia v. Ashcroft*, 539 U.S. at 490. Unquestionably, progress has been made in ensuring that minority groups have a voice in the political process. Our country, however, has not reached the point where race is no longer determinative in elections and the

Voting Rights Act is no longer needed. The 50% rule should not be placed as a roadblock that will impede the progress that has been made under the Voting Rights Act. The 50% rule adopted by the North Carolina Supreme Court frustrates congressional intent to move towards a time when the race of a candidate no longer matters.

CONCLUSION

The decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted.

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

*Counsel of Record

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GARY BARTLETT, *et al.*,
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v.

DWIGHT STRICKLAND, *et al.*,
Respondents,

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF FOR THE RESPONDENTS

CARL W. THURMAN III
Counsel of Record
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. 1973, require the creation of an electoral district designed to elect a racial minority group's candidate of choice when the minority group does not comprise a majority of the citizen voting age population of the district and the district drawn otherwise would not be permissible under a State's neutral redistricting criterion?

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42 U.S.C. § 1973 ..... *passim*

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MISCELLANEOUS

Luke P. McLoughlin, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Cases*, 80 N.Y.U.L.REV. 312 (2005) 30

Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 Colum.L.Rev. 1710 (2004) 40

U.S. Census Bureau, *Quick Facts*, http://quickfacts.census.gov/qfd/states/37/37141.html 1

N.C. State Board of Elections, 2000 Election Results, http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000elect/stateresults.htm. 8, 49

N.C. State Board of Elections, 2002 Election Results, http://www.sboe.state.nc.us/content.aspx?id=69 . . . . . 8, 49

STATEMENT

A. Factual Background

Respondents are residents of Pender County, North Carolina, an historically rural area which experienced population growth of 42.4% during the decade of the 1990s.[1] Entering the legislative redistricting cycle after the 2000 census, a Pender County resident had not served in either the North Carolina House or Senate in over thirty years. JA 20. As with most areas in the United States, North Carolina counties have divergent concerns based upon their local circumstances, but unlike many areas counties in North Carolina, have only the powers and authority granted to them by the General Assembly.[2] Given the constraints on county

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[1] Pender County grew from 28855 in the 1990 census to 41,082 in 2000. *http://quickfacts.census.gov/qfd/states/37/37141.html.* The growth pattern has continued as its population has increased by 21% as the July 1, 2007 census estimate. *Id.* (Follow "Browse data sets for Pender County" hyperlink)

[2] *County of Hoke v. Byrd*, 421 S.E.2d 800, 806 (N.C. Ct. App. 1992)(legislative authority of County limited to that expressly granted or by necessary implication of expressly granted powers.)

power, having a responsive legislative delegation is necessary in order to formulate solutions to local concerns.

In the redistricting plan adopted after the 1990 census, Pender County had been split among five North Carolina House Districts.[3] After a decade of explosive growth, Pender County residents sought a consolidation permitting a more unified voice. In the redistricting plan proposed by the General Assembly in 2001, Pender County was to be split among five House and three Senate districts, sharing House representation with ten other counties. JA 137. This splintering of the county resulted in the Pender County Commissioners unanimously voting to submit an *amicus* brief in *Stephenson v. Bartlett,* 562 S.E.2d 377 (N.C. 2002) (*Stephenson I*). The issue in *Stephenson I* was whether the North Carolina General Assembly was required to follow the "Whole County" provisions of

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[3] Petitioners reference Department of Justice (DOJ) Review as part of the basis for the creation of a Section 2 VRA District, but DOJ review is limited to Section 5 jurisdictions, and neither Pender nor New Hanover County are subject to Section 5. Petitioner's Brief at 3.

the North Carolina Constitution. N.C. Const. art. II §§ 3(3), 5(3)(Whole County Provisions). The North Carolina Supreme Court held that the legislature did have to abide by the North Carolina Constitution and the opinion set forth detailed criteria to be followed. The majority opinion in *Stephenson I* expressly recognized the plight in which Pender County was placed because it was "balkanized" by its citizens being divided into multiple legislative districts. *Id.* at 383. After the decision in *Stephenson I*, alternative districts were proposed by the State, but those districts were found to be invalid under the *Stephenson I* criteria and districts crafted by the trial court were used for the 2002 election. The 2002 interim plan imposed by the trial court kept Pender County within a single House district (as did the 2002 plan proposed by the State). In the 2002 election, a Pender County resident was elected to the General Assembly.

The North Carolina Supreme Court reviewed both the second redistricting proposal from the State and the plan imposed by the trial court, finding that neither complied with the State Constitution and the

redistricting criteria set forth in *Stephenson I*. *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (*Stephenson II*). The Court set forth in detail the procedures to be followed by the N.C. General Assembly in drawing subsequent districts and emphasized that Counties were to be grouped together for the purpose of minimizing the splitting of Counties.[4] Following *Stephenson II*, the current

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[4] The Court provided the guidelines to be used by the General Assembly in formulating constitutional redistricting plans in *Stephenson II* as follows:

> [1.] ... [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.
>
> [3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative

district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. [6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined* . . . [7.] *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*

House redistricting plan, which was adopted on November 25, 2003, split Pender County between House Districts 16 and 18.

B. PROCEDURAL HISTORY

In May 2004, this action was brought alleging that the split of Pender County into two legislative districts violated the North Carolina Constitution and the redistricting criteria set forth in *Stephenson I*. Pender County's 2000 census population of 41,082 is approximately 61.25% of the population needed for an ideal House district. JA 23. Pender County and New Hanover County combined have sufficient population to support three house districts and were "clustered" in the 2003 House plan. JA 24. Of the three house districts formed in the Pender-New Hanover cluster, only the 19th lies solely in New

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> [8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> [9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.
> *Stephenson II* at 250-52 (emphasis added) (quoting *Stephenson I* at 396-98).

Hanover County, while both the 16th and 18th are composed of parts of Pender County and New Hanover County. JA 25. Pender County was divided almost in half, with 19,607 citizens in District 16 and 21,475 in District 18. It would have been possible to draw three districts in the Pender-New Hanover cluster and only have one district which crossed county lines by creating two within New Hanover County and one comprising all of Pender County and a portion of New Hanover County. JA 24.

A three judge panel was appointed and a hearing was conducted on Respondents' request for preliminary injunction that Pender County be kept whole for the 2004 legislative election cycle. In support of their motion for preliminary injunction, Respondents submitted alternative districts which complied with the Whole County provision of the North Carolina Constitution. JA 34. The districts were drawn using the General Assembly's "District Builder" software program. As part of the software package, voting results for selected statewide races involving African American candidates for State Auditor and seats on the North Carolina Supreme

Court in a potential district are available. JA 35. In both the alternative districts drawn by Respondents, the Black candidates won a significant majority of the votes, despite losing two of the three races statewide.[5] The vote percentages for the Black candidates were: for State Auditor 62.55% and 61.33% versus 51% statewide, for Chief Justice of the N.C. Supreme Court 59.33% and 59.05% versus 49% statewide; and for Justice of the N.C. Supreme Court 59.25% and 58.82% versus 46.12% statewide. JA 81-83. In the first alternative district, the Black percentage of total population was 38.77% and the Black percentage of voting age total population was 35.55%. JA 80. The second alternative district had Black total population of 35.65% and Black voting age total population of 31.27%. JA 82. District 18

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[5] Statewide election results are from the State Board of elections with the 2002 results available at http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/resultsby_contest_single1.asp?ED=11xx05xx2002GENERAL2002ASUPREME%2520COURT%2520%28BUTTERFIELD%29&B1=Submite and the 2000 results available at http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000elect/stateresults.htm.

had total black population of 42.89% and Black voting age population of 39.36%. JA 139. JA 78-83.

After the preliminary injunction was denied, the parties engaged in discovery and briefed and argued cross motions for summary judgment. The three Judge panel found with Respondents that the districts as drawn violated the North Carolina Constitution unless the Constitution was preempted by Section 2 of the VRA, noting that if they were to interpret "the first prong of *Gingles* as a 'bright line' requirement that the minority group seeking Section 2 VRA relief must be a numerical majority, then this case is over and District 18 as presently drawn is 'toast.'" Pet. App. 91A. (*Thornburg v. Gingles* (Gingles), 478 U.S. 30 (1986)) Finding that Section 2 of the VRA did not impose a bright line test, the three judge panel upheld the districts.

The North Carolina Supreme Court agreed with all the Federal Circuit Courts who reviewed the issue, including the 4th Circuit, in which North Carolina is located, holding that this Court meant an actual majority was required for a majority-minority district under the first prong of the *Gingles* test. *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C.

2007). In its August 2007 opinion, the North Carolina Supreme Court directed that District 18 be redrawn for the 2010 election cycle, but left to the General Assembly, the question of whether to draw it as a non-VRA district which complied with the Whole County provision or whether to redraw it as a VRA district with an actual majority-minority population. *Id.* at 376.

SUMMARY OF ARGUMENT

Continuing to require that a minority group which is seeking to make a claim under Section 2 of the Voting Rights Act constitute a majority of the proposed district follows the actual language of the Act and provides a workable framework for those drawing district lines as well as the courts which must evaluate compliance with the Act. Section 2 protects the right of minority voters "to elect representatives of their choice." 42 U.S.C. 1973(b). The Act does not purport to protect the right "to help elect" or "to form a coalition to help elect" a representative. In simplest terms the minority group must constitute a majority of the district in order "to elect" a representative. *Id.*

This reading of Section 2 also is consistent with the purpose of the Act to protect minority voters. There is no indication that the purpose of the Act is protect coalitions. Nor is there any basis for concluding that the purpose is to promote candidates of a particular political party which minority voters may support. The 50% rule provides protection to minority voters when they otherwise would be denied an equal opportunity, but avoids creating a district designed to give them an unequal opportunity to which their population numbers would not entitle them.

Petitioners are correct that the North Carolina Supreme Court did indeed follow the literal language of the three prong test established by this Court in *Gingles*. Their argument lacks any citation of authority or logical basis to support their contention that lower courts should not to follow the actual language used by this Court in its opinions. The first condition for a viable Section 2 claim set out by this Court was that "[a] minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority

in a single-member district." *Gingles* at 50. In accord with every Federal Circuit Court of Appeals to have decided the issue, the North Carolina Supreme Court applied the test as written by this Court. In doing so, the word "majority" is given its ordinary and traditional meaning. If the easily understood 50% rule established by *Gingles* is to be overruled, it certainly is not the place of the North Carolina Supreme Court to do so.

The 50% rule provides a comparatively easy to apply standard for electoral districts of all types. This is consistent with Congressional intent that objective factors be utilized. *See* S.REP. NO. 97-417, at 120-21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 292-93 (Report of the Subcommittee on the Constitution). Given that Section 2 applies to all jurisdictions for all levels of elected office, readily determined objective criteria are crucial to permit implementation of the Act. The 50% rule is such a rule which can be applied to the wide variety of electoral districts to which it applies.

The goal of Section 2, to protect equal opportunity, is furthered by the continued use of the

majority-minority requirement. Unlike Section 5, which applies only to covered jurisdictions with particular evidence of voting discrimination, Section 2 is designed to prevent the denial of equal opportunity in all areas of the United States. An attempt to convert Section 2 into a tool for promoting electoral success for members of one race by ignoring race neutral redistricting criteria is inconsistent with both the text of the Act and the purpose of minimizing the role of race in politics. Instead of protecting minorities from discrimination which would prevent them from achieving the representation to which they are entitled, Section 2 would be used to guarantee racial minorities election victories to which they are not entitled under neutral criteria. Such an approach is of questionable constitutional validity and will increase, not decrease, the role of race in politics.

ARGUMENT

I. The Voting Rights Act Requires that Vote Dilution Claimants Comprise a Majority of the Pertinent District

The Voting Rights Act is an exceptional federal statute which protects an important constitutional right – the right to vote. At the same time, it places state and local voting regimes under the microscope of a complex federal jurisprudence on election procedures. As a result, this Court has been careful to ensure that the Act both has the necessary scope to achieve its purpose and, at the same time, has the appropriate limits to ensure that it does not become more intrusive and disruptive than its language and purpose warrant.

This Court has found a claim of dilution to arise under the Voting Rights Act on the view that dilution may be a "standard, practice, or procedure" that results in members of a protected class of citizens having "less opportunity than other members of the electorate to participate in the

political process and to elect representatives of their choice." 42 U.S.C. 1973(b); *see, e.g.*, *Gingles* at 36.[6]

In the dilution context, the most appropriate reading of the Act is that in order to state a dilution claim, it must be shown that minorities have been denied a district justified by geography or another factor in which the minority group would be an actual numerical majority. Any other reading of the test for vote dilution would give rise to endless conjecture and speculation about possible combinations and coalitions in the political process. Moreover, vote dilution is a distinctive claim. Rather than being based on, for example, an obstacle to voting, it is based on a claim of unjustified dispersal of voting power. In order for such a claim to be cognizable and coherent, it must be based on a claim of dispersal from what would have been a majority district for a minority.

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[6] Justices Thomas and Scalia, however, have made clear their view in their dissents in *Holder v. Hall*, 512 U.S. 874, 945 (1994) and *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 511 (2006), that Section 2 cannot "be construed to cover potentially dilutive electoral mechanisms."

The majority-minority district requirement is the most sound reading of Section 2 and is consistent with Congress' contemporaneous understanding of vote dilution claims. In tracing the expansion of the 1965 Voting Rights Act to include vote dilution claims, the legislative history of the 1982 amendments to the Voting Rights Act discussed vote dilution claims where the minority population was diminished from over 50% to under 50% of a community. S.REP. NO. 97-417 at 120-21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 292-93 (Report of the Subcommittee on the Constitution). The majority-minority district requirement is also consistent with Congress' preference for readily ascertainable and predictable standards in Voting Rights Act litigation. In setting forth the Voting Rights Act standards in Section 2(b), Congress stated that "[t]he courts are to conduct this analysis on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs." *Id.* at 67; *Gingles*, 478 U.S. at 44 (in order to answer the question of whether plaintiffs have "'an equal opportunity to participate in the political processes

and to elect candidates of their choice,' ... a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'") (quoting S.REP. NO. 97-417 at 27-28 (1982)).

A. This Court's Cases Establish a Majority-Minority Requirement

This Court's application of amended Section 2 to the vote dilution claim in *Gingles* established necessary preconditions for a vote dilution claim. The three "necessary preconditions" to state a vote dilution claim include a requirement that "[a] minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The plain meaning of "majority" is a numerical majority, i.e. above 50%, which is how the term was used in the *Gingles* case itself. *Id.* at 38; *Gingles v. Edmisten*, 590 F. Supp. 345, 380 (E.D.N.C. 1984) ("[E]ffective voting majorities" of minority voters were all numerical majorities in hypothetical single-member districts.). The Court in *Gingles* was certainly aware of the

District Court's finding that a minority population of 46.2% of the registered voters did not "constitute . . . an effective voting majority" in one of the challenged districts. 590 F. Supp. at 358. The Court defined "majority" in *Gingles* with reference to this understanding of the numerical population distribution at issue and used "majority" to mean a numerical majority.

This Court has never found a Voting Rights Act violation based on a vote dilution claim where the pertinent district would include less than a majority of minority voters. *See, e.g., Growe v. Emison*, 507 U.S. 25 (1993) (finding no vote dilution on other grounds); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (finding no vote dilution on other grounds); *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*) (finding no vote dilution on other grounds with respect to the district in which the minority population was not a majority). It would be breaking significant new ground for the Court to hold in this case for the first time that a vote dilution claim could be based on a minority group comprising less than a majority of the pertinent district.

None of the above mentioned cases – or any other cases decided by this Court – has allowed a protected class with a population less than a numerical majority of the relevant total population in a single-member district (hypothetical or actual) to state a claim for vote dilution under Section 2. As Judge Kozinski emphasized in *Romero v. City of Pomona*, "We are aware of no successful section 2 voting rights claim *ever* made without a showing that the minority group was capable of a majority vote in a designated single district." 883 F.2d 1418, 1424 n.7 (9th Cir. 1989)(emphasis added), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). Contrary to Petitioners' assertion, Justice O'Connor did not "endorse ... a claim in circumstances in which minority voters can elect their candidates of choice with limited crossover voting," Pet. Br. at 24, but specifically warned against measuring undiluted minority voting power in such a way as to approach requiring proportional representation. *Gingles*, 478 U.S. at 94 (O'Connor, J., concurring). In any event,

moreover, it is clear that the Court has never adopted an interpretation of the Voting Rights Act that enforced a vote dilution claim under the Act based on a *minority*-minority district.

B. The Overwhelming Consensus in Lower Courts is to Apply the Majority-Minority Requirement as Part of the First *Gingles* Precondition

As the North Carolina Supreme Court noted in *Pender County*, the majority-minority district requirement has been found to be an element of the first *Gingles* precondition in the overwhelming majority of courts that have addressed the issue. *Pender County*, 649 S.E.2d at 372. To redefine the majority-minority district requirement in the first *Gingles* prong as Petitioners urge to include combinations of minority and crossover voters would disturb how the *Gingles* preconditions are, and have been, applied in nearly every Circuit. As Judge Duncan stated in *Hall v. Virginia*, "*Gingles* establishes a numerical majority requirement for all section 2 claims ..." 385 F.3d 421, 423 (4th Cir.

2004). In *Hall*, the Fourth Circuit affirmed the district court's ruling that vote dilution had not occurred in single-member districts at issue in Virginia. The court explained that when a minority group could be a majority in a district, only by combining with white crossover voters, the minority group could not state a vote dilution claim. *Id.* at 430. "Under these circumstances, minorities cannot claim that their voting strength – that is, the potential to independently decide the outcome of an election – has been diluted in violation of Section 2." *Id.* at 429.

Similarly, the Fifth Circuit in *Valdespino v. Alamo Heights Indep. Sch. Dist.* stated that "this court has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population." 168 F.3d 848, 852 (5th Cir. 1999). The court in *Valdespino* held that the minority population at issue could not state a vote dilution claim because it constituted less than a majority of the voters in the pertinent district. *Id.* At 852-53. The Seventh Circuit in *McNeil v. Springfield Park Dist.* also applied the "50 percent

rule" as part of the first *Gingles* condition. 851 F.2d 937 (7th Cir. 1988). As Judge Cudahy stated in his opinion for the court:

> Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations. In our view, the Court based its brightline requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice. Other scenarios are, of course, possible, but that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a brightline test.

Id. at 944.

The Sixth Circuit in *Nixon v. Kent County* similarly applied the majority-minority district requirement in holding that two different minority groups forming a numerical majority in a single-member district were barred from bringing a vote

dilution claim where no one minority group was numerous enough to form a majority of a single-member district. 76 F.3d 1381 (6th Cir. 1996). The Eighth Circuit, Tenth Circuit, and Eleventh Circuit also apply the majority-minority district requirement.[7] *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (affirming finding of vote dilution as minority group satisfied first *Gingles* precondition, which "[R]equires only a simple

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[7] The First Circuit has left the issue open. In *Metts v. Murphy*, the court indicated its decision was based on the early stage of the proceeding; it was "unwilling at the complaint stage to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced . . . from 26 to 21 percent." 363 F.3d 8, 11 (1st Cir. 2004) (emphasis in original). Notably, even at the preliminary stage, Judge Selya disapproved of plaintiffs' position "treating crossover voters as if they constitute part of a protected minority within the purview of section 2." *Id.* at 14 (Selya, J., dissenting). He added that:

> Allowing a vote dilution claim [under the circumstances in *Metts*] to go forward would make sense only if the end game were to ensure the success of candidates favored by minority groups. That is plainly not the proper object of section 2 of the VRA, which is a law aimed at ensuring equality of opportunity rather than at guaranteeing the electoral success of a particular candidates."

Id.

majority of eligible voters in the single-member district.") (citation omitted); *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (quoted in *Pender County v. Bartlett*, 649 S.E.2d 364, 372 (N.C. 2007) ("[S]atisfaction of the [*Gingles*] first precondition requires plaintiffs show [that] a majority-Hispanic district is feasible"); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1566 (11th Cir. 1997) (affirming trial court's finding of no Section 2 violation, holding the *Gingles* factors as necessary preconditions to vote dilution claim)[8]. Additionally, as noted above, the Ninth Circuit in *Romero v. City of Pomona* was emphatic in its view that no Voting Rights Act Claim could be "made without a showing that the minority group was capable of a majority vote in a designated single district." 883 F.2d at 1424 n.7.[9] Judge

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[8] The North Carolina Supreme Court in *Pender County* noted that "a later Eleventh Circuit case purports in a footnote to 'leave open the question of whether a section 2 plaintiff can pursue a coalition or crossover dilution claim.'" 649 S.E.2d at 372 n.2 (quoting *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004)).

[9] The court in *Romero* declined to address whether two different minority groups could combine to form a numerical majority-minority in a single member district to satisfy the first *Gingles* precondition. 883 F.2d at 1427 n.15.

Kozinski added that even "cases prior to *Thornburg* held that no section 2 claim could be brought unless plaintiffs demonstrated that the minority group was capable of forming a majority of voters in a single district." *Id.* at 1424. The majority-minority district requirement is, and has been, the dominant law of the land, and Petitioners' position would represent a radical change in the existing Voting Rights Act landscape.

C. The Majority-Minority Requirement Applies to the Threshold Necessary to State a Vote Dilution Claim Before Evaluating that Claim Based on the Totality of the Circumstances

This Court and other courts have consistently held that the *Gingles* factors –including the numerical majority test – are the proper threshold inquiry *prior* to evaluating a vote dilution claim based on the totality of the circumstances. Petitioners, however, claim that the totality of the circumstances test requires watering down the first *Gingles* precondition. Quite to the contrary, the *Gingles* Court stated that a "necessary precondition" to a vote dilution claim is whether a minority group

could "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Petitioners' reliance on *De Grandy* to support their argument is misplaced. Pet. Br. at 33. The Court in *De Grandy* described the three *Gingles* factors as "'necessary preconditions' for establishing vote dilution" and "clearly identified" the three factors as "generally necessary to prove a § 2 claim." 512 U.S. at 1011 (quoting *Gingles*, 478 U.S. at 50). The Court also explained that the *Gingles* factors are not "sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *De Grandy*, 512 U.S. at 1011. "[I]t is worth remembering that ...proof of the *Gingles* factors has not always portended liability under § 2." *Id.* at 1012, n.10.

Also contrary to Petitioners' argument that the first threshold *Gingles* precondition is "the very antithesis" of the totality of the circumstances test,

Pet. Br at 32 – 33, this Court's cases demonstrate that the Court applies the *Gingles* factors as preconditions for *raising* a claim and not as part of the totality of the circumstances test for *evaluating* that claim. The Court in *LULAC* reiterated that the *Gingles* preconditions are "threshold conditions for establishing a § 2 violation," adding that "if all three *Gingles* requirements are established, the statutory text directs us to consider the 'totality of the circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate." 548 U.S. at 425; *see also Negron*, 113 F.3d at 1566. ("Proving the three preconditions is not the end of the story . . . As § 2 mandates, a court must look to the totality of the circumstances to determine whether there is impermissible vote dilution."). Petitioners' argument is simply at odds with the well-established application of the *Gingles* criteria.

D. The Majority-Minority Requirement Creates a Judicially Manageable Standard for Vote Dilution Claims

Without the majority-minority district requirement's clearly understandable measure of undiluted voting strength in vote dilution claims, the courts could be in an endless morass of litigation in an attempt to determine the threshold population ratio at which the minority population has the ability to participate and elect. *See Pender County v. Bartlett*, 649 S.E.2d 364, 373 (N.C. 2007) (warning against a "Pandora's box" of Voting Rights Act claims by numerically modest minority groups) (internal citations omitted). The threat of Voting Rights Act litigation would hang precariously over the states when any population of minorities – regardless of size – alleges that it is unable to elect its candidate of choice. *See id.* Accordingly, in vote dilution claims that allege inequality in the opportunity to elect – not an inequality in the opportunity to participate in the political process – it is critical to have a sound and reliable basis for determining whether members of a protected class

are experiencing discrimination in how their votes count or, conversely, their preferred candidates lose for any one of the many reasons candidates lose elections. That sound and reliable basis is the majority-minority district requirement, which is closely tied to the statutory language that is the basis for permitting vote dilution claims.

Petitioners' interpretation of the majority-minority district requirement, on the other hand, would enable any size minority population to state a vote dilution claim if that population were able to demonstrate the *possibility* of securing enough crossover voters for their preferred candidate to win. This interpretation would entail a speculative exercise at best, without a manageable objective basis for measuring when a minority group is large enough to be able to claim that its voting strength had been diluted. This interpretation – not the well-settled interpretation that Respondents urge the Court to leave undisturbed – would create an unmanageable standard for vote dilution inquiries that would involve conjecture about political behavior and voting patterns of endless

permutations of racial and political groups within districts.

Allowing vote dilution claims by members of a protected class who can achieve majority status only by combining their votes with those of crossover voters would require the courts to delve deeply into speculative political questions. This type of vote dilution claim would require courts to examine claims of past and future voting patterns across and among different racial groups, and their intersection with states' and parties' rules for nominating candidates and voting in primaries. *See* Luke P. McLoughlin, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312 (2005). Indeed, resting Voting Rights Acts claims on speculative crossover districts will require "determining the extent of minority clout in a political party," which is "far more difficult to quantify than merely counting voting age population (or citizen voting age population) in a party." *Id.* at 336. This type of inquiry will require not just an examination into the voting practices of a minority group but also into the predictability of crossover voting for minority

preferred candidates. The latter inquiry requires an examination into the reasons for white crossover voting and whether those reasons will exist in future elections such that minority preferred candidates would continue to be elected. Evaluating these issues would turn judges into political pundits making predictions about future political changes and the reliability and nature of political coalitions and voting behavior.

II. The Majority-Minority Requirement is Consistent with the Voting Rights Act and Congressional Intent

Petitioners claim that any diminution in the ability of a group of a protected class of citizens – regardless of size – to elect its preferred candidate is vote dilution. *See* Pet. Br. at 28. There are two concepts implicit in Petitioners' argument that are at odds with the Voting Rights Act. First, Petitioners' argument would have the effect of requiring maximization of the voting strength of a minority group regardless of its size. This maximization concept is a distortion of the Voting Rights Act and

creates a policy that has been endorsed by neither Congress nor the courts. Second, although the Voting Rights Act guarantees equal opportunities for a protected class of citizens, *i.e.*, racial and language minorities, *see Gingles*, 478 U.S. at 43, it does not, as Petitioners argue, protect the aggregated voting strength of minority and crossover voters who vote for the same candidate for any number of reasons.

A. Minority Vote Maximization is Inconsistent with the Voting Rights Act

Petitioners' argument that any size minority population could state a vote dilution claim based on its inability to elect its candidate of choice is tantamount to requiring minority voting strength maximization. Such maximization comes close to requiring proportional minority representation, which is explicitly rejected in the text of Section 2. 42 U.S.C. § 1973(b). As Senator Grassley explained in the Senate Report accompanying the 1982 amendment to the Voting Rights Act, "In working on this proposal, I acted on the basic assumption that selected minority groups should not be subjected in invidious exclusion from effective political

participation; *neither should they be entitled to constitutional protection from defeat at the polls.*" S.REP. NO. 97-417 at 197 (1982) (Supplemental View of Charles E. Grassley) (emphasis added).

Similarly, this Court in *Johnson v. De Grandy* explicitly rejected the idea that minority voting maximization is a proper goal or test under Section 2 stating:

> [R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

512 U.S. at 1016-17 (1994). Notably, this Court disapproved of the District Court apparently adopting a "rule of thumb ... that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2 ..." *Id.* at 1016. "[R]eading the first Gingles

condition in effect to define dilution as a failure to maximize ... causes its own dangers, and they are not to be courted." *Id.* Subsequently in *LULAC,* the Court again rejected the idea that minority voting maximization could be read in Section 2 and reiterated its stance in *De Grandy*. 548 U.S. at 428.

The Circuit Courts have likewise rejected the idea that minority voting strength maximization comports with the Voting Rights Act's protections. For example, the Tenth Circuit stated that "As enacted, Section 2(b) [of the Voting Rights Act] promises protected minorities an even playing field, not a certain victory." *Sanchez v. Colorado*, 97 F.3d 1303, 1309. (10th Cir. 1996). As Judge Duncan stated in the Fourth Circuit's decision in *Hall v. Virginia*, "Section 2 does not create an *entitlement* for minorities to form an alliance with other voters in a district who do not share the same statutory disability as the protected class." 385 F.3d at 431, n.13 (emphasis in original). Judge Duncan added:

> The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a

> district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters."

Id. at 430 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993)). Accordingly, Petitioners' implicit argument for minority voting strength maximization is at odds with the Voting Rights Act, Congressional intent, and judicial interpretation of the statute.

B. A Combination of Minority and Majority Voters Is Not Protected Under the Voting Rights Act

A combination of minority and majority voters who share political views is not a protected class that can claim vote dilution protection under the Voting Rights Act based upon its failure to elect its candidates of choice, even though the combined group includes some minority members. The Fourth Circuit in *Hall* explained that "[i]f a minority group lacks a common race or ethnicity, cohesion must rely

principally on shared values, socio-economic factors and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities." 385 F.3d at 431 (internal citations omitted). Similarly, the Sixth Circuit noted that "[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition." *Nixon*, 76 F.3d at 1392 (internal quotation marks omitted). Such a political coalition "is a group of citizens about which Congress has not made a specific finding of discrimination ..." and that cannot claim vote dilution protection under Section 2. *Id.* at 1391.

It would be an extraordinary expansion of the Voting Rights Act to hold now that a political coalition of minority and white voters could state a vote dilution claim. "Permitting such political coalitions the advantage of Voting Rights Act protection . . . risks wrenching the Act from its ideological and constitutional foundations, as well as 'dilut[ing] its effectiveness as a measure of the causal relationship among statutory disability,

election structures or processes, and election outcomes.'" *Nixon*, 76 F.3d at 1392. (internal citations omitted). Even Judge Keith in his dissent in one of the leading Court of Appeals cases recognized that "the Voting Rights Act prohibits formation of separate 'minority' districts when a protected ethnic group and the white majority vote together. . . " *Id.* at 1399. Allowing combinations of minority and white voters to bring vote dilution suits would call for a dramatic, unjustified expansion of the reach of the Voting Rights Act.

Such a pronounced departure from how vote dilution claims are evaluated cannot be imputed to the text of Section 2 or its legislative history absent an indication from Congress that it intended this departure. *See, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice [vis-à-vis enforcement of the Emergency Price Control Act of 1942], an unequivocal statement of its purpose would have been made."); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F.

Supp.2d 76, 100-01 (D.D.C. 1998) ("It is a cardinal principle of statutory interpretation that dramatic departures from past practices should not be read into statutes without a definitive signal from Congress.") Petitioners' construction of the text of Section 2 would turn on its head the well-settled application of the majority-minority district requirement for vote dilution claims, which courts have repeatedly applied since Congress adopted the Voting Rights Act.

Furthermore, Petitioners cannot find support for vote dilution claims by a coalition of minority and majority voters through the absence of an explicit prohibition on such claims in the text of Section 2 and the legislative history of the 1982 amendments. *See* Pet. Br. at 34. As the Sixth Circuit explained, "The question is not whether Congress in the Voting Rights Act intended to *prohibit* such coalitions [of two different minority groups]; instead, the proper question is whether Congress intended to *protect* those coalitions. A statutory claim cannot find its support in the absence of prohibitions." *Nixon*, 76 F.3d at 1388 (internal citation omitted) (emphasis in

original). Moreover, Petitioners are inconsistent in, on the one hand, arguing that because the majority-minority district requirement is not mentioned in the text or legislative history of Section 2, it is invalid, and, on the other hand, intimating that their claim is not impaired by the absence of any intent to permit crossover or coalition vote dilution claims in the text or legislative history. Petitioners' attempt to expand the Voting Rights Act to include vote dilution claims by a combination of minority and white voters for the first time since its enactment in 1965 would be a radical departure from how the statute is interpreted and should not be permitted.

III. The Majority-Minority Requirement under Section 2 Creates No Conflict with Section 5 of the Act Because the Two Sections Have Different Purposes, Processes and Functions

As Petitioners acknowledge, "Section 5 and Section 2 differ in certain important respects" and they note the "distinct language [and] purposes of the two. . .. " Pet. Br. at 36. Pet. Br. at 36. Indeed, as one commentator pointed out:

> The difference between the two sections of the VRA is significant. As set out above, section 5 is an administrative mechanism designed to lock in place the status quo ante, unless the legislature demonstrates that any proposed changes do not have a retrogressive effect. By contrast, section 2, as amended in 1982, provides for a plenary adjudication of whether a particular electoral practice, such as the use of multimember election districts, is actually discriminatory and should be struck down.

Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1718 (2004). The Court's decisions recognize this distinction and emphasize that "[w]hile some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections differ in structure, purpose, and application." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (internal quotations omitted).

Furthermore, this Court has explained that "recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

Petitioners attempt to conflate the standards for Section 5 pre-clearance and Section 2 vote dilution inquiries by asserting that these two distinct provisions serve the same "purpose" (despite acknowledging – in the same paragraph – the "distinct language [and] purpose[]" of the two sections) and are in "disharmony" because the jurisprudence that has developed around the two sections has been divergent. Pet. Br. at 36. As their sole support for this proposition, Petitioners rely on this Court's acceptance of "coalition districts" as permissible for retrogression analysis under Section 5 of the Voting Rights Act in *Georgia v. Ashcroft*, at 492. Petitioner's argument, however, disregards this Court's jurisprudence and the different purposes, structure, and application of Sections 2 and 5 and

would create a hybrid Section 2 and Section 5 vote dilution inquiry which would be an entirely new interpretation of the Voting Rights Act that finds no basis in the statute or this Court's cases.

IV. Abandoning the Majority-Minority Requirement Will Enable Gerrymandering in the Guise of Protecting Minority Rights

Abandoning the 50% rule opens the door for increased gerrymandering by providing a means to ignore traditional redistricting criteria. Preservation of political subdivisions provides one of the most effective means to limit various forms of gerrymandering without any reasonable dispute. *See, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (stating that it is legitimate for states to "[D]esire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.")(internal citation omitted); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 647 (1993) (emphasizing the importance of "[O]bjective factors," such as "[C]ompactness, contiguity, and respect for political subdivisions" because they may show that a state has not

gerrymandered along racial lines). Requirements for the preservation of political subdivisions serve independent values; they facilitate political organization, electoral campaigning and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring). In North Carolina, the voters have adopted a constitutional provision which limits the ability of legislators to gerrymander districts by requiring that County lines be respected in the redistricting process. *See, Stephenson I.* Petitioners are correct that the current language in the North Carolina Constitution regarding keeping counties whole was adopted in 1968 as a response to this Court's one person one vote jurisprudence. Pet. Br. 4-5. As the North Carolina Supreme Court observed in *Stephenson I*, however, use of county lines for redistricting dates to the original 1776 North Carolina Constitution, and in amendments to the State constitution in 1835 splitting of counties among senate districts was forbidden. *Stephenson I* at 366. Such a limitation forces a community of interest to be kept together and is a neutral criterion on which to base the drawing of district lines.

Replacing the clear 50% rule with uncertainty will invite those who are so inclined to engage in gerrymandering by permitting a basis to ignore traditional redistricting criteria. The only Circuit Court opinion to which Petitioners could point for claiming a split among the circuits establishes the point. In *Metts v. Murphy*, the First Circuit reversed the grant of a 12(b)(6) dismissal where the contention was that the reduction of the black population from 26% to 21% in a state senate district constituted a violation of Section 2. *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004). While a settlement was reached in *Metts* so that the First Circuit never reached a ruling on the merits, allowing claims that 26% of the population constitutes a majority would be the logical conclusion of abandoning the 50% rule by permitting ever smaller "majorities" to control a district. North Carolina voters now have the protection of the *Stephenson* decisions in preventing voters being aligned in ways designed to benefit politicians instead of voters. If the 50% rule is abandoned, that protection will be undermined and voters again will

be at the mercy of incumbents who realize that years may pass before a Court resolution can occur.

V. The Majority -Requirement Helps Minimize the Role of Race in Politics

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting. . . . Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent ..." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotations and citation omitted); *see also Georgia v. Ashcroft*, 539 at 490 ("The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.") The majority-minority district requirement in *Gingles* is a reliable and manageable way to measure whether Section 2 has been violated and does not require undue focus on race in politics.

The mere existence of divisions based upon race move us away from a color blind society as this Court recognized in *Shaw I*. "('If our society is to

continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury'). By perpetuating such notions a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Shaw I*, at 648 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991)). The special dangers of racial divisions in connection with voting have received particular attention from the Court "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I* at 657. In *Stephenson I* the North Carolina Supreme Court found that the Whole County provision prevented Pender County citizens from being "balkanized" by a political gerrymander. *Stephenson I* at 383. Section

2 should not be used to balkanize them on the basis of race.

While not dispositive, the failure of Congress to make any change to Section 2 in the 22 years since *Gingles* ,while every Circuit Court deciding the issue on the merits adopted the "bright line" 50% rule, is persuasive evidence that this Court, and the Circuit Courts, correctly interpreted Section 2. As the amendments to Section 5 of the VRA within three years of *Georgia v. Ashcroft* show, Congress quickly can amend the VRA when it disagrees with the construction provided by this Court.[10] The failure to do so strongly suggests that the current rule is both consistent with Congressional intent and actually working in practice. To abandon a functional and workable rule for complete uncertainty would require far more compelling reasons than any offered by Petitioners.

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[10] *See* H.R. Rep.No. 109-478, at 94 (2006) (noting that the new Section 5 partly overrules *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

VI. The Majority-Minority Requirement Avoids Conflict Between Section 2 and The Court's Equal Protection Jurisprudence

Continued adherence to the 50% rule reduces the potential of conflict between Section 2 claims and this Court's equal protection jurisprudence under *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). Without the 50% rule, districts would be drawn not to protect minority citizens from having their votes diluted, but instead would be drawn for the purpose of ensuring members of one race will win an election. This would be done even where, as here, traditional redistricting must be ignored. In rejecting the ability of a minority population of 25.7% of a district to state a claim for a Section 2, district Justice Kennedy observed, "Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious

constitutional questions." *LULAC*, 548 U.S. at 446. By adhering to the 50% rule, the role of race in politics is diminished and the Court avoids a conflict between Section 2 and its equal protection jurisprudence.

This case illustrates the inevitable collision between Section 2 claims and equal protection jurisprudence. Respondents demonstrated that districts which complied with the Whole County provision provided Black candidates with an opportunity to elect because Black candidates in statewide races carried those districts with between 62.55% and 58.82 % of the vote.[11] "As we suggested

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[11] *See* Page 8, s*upra.* On a countywide basis the Black candidate for Supreme Court Justice in 2002 received 49.57% of the vote in Pender County and 44.42% of the vote in New Hanover County, while receiving 46.12% of the statewide vote versus 59.25% and 58.82% in the alternative districts. http://www.sboe.state.nc.us/content.aspx?id=69 The Black candidate for Auditor in 2000 received 52.04% of the vote in Pender County, 47.99% in New Hanover, and 50.51% statewide versus 62.55% and 61.33% in the alternative districts. The Black candidate for Chief Justice received 47.76% of the vote in Pender County, 44.94% in New Hanover and 48.64% statewide versus 59.33% and 59.05% in the alternative districts. http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000elect/stateresults.htm

in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller v. Johnston*, 515 U.S. at 921. Here the evidence shows that a district drawn using traditional redistricting criteria produces a district which provides an opportunity to elect.[12] Petitioners instead appear to seek a district designed to ensure the election of a candidate favored by citizens of one race which is contrary to the purpose of § 2. *Voinovich*, at 153 ("The objective of § 2 is not to ensure that a candidate supported by minority voters can be elected in a district.").

Section 2 is designed to prevent minority citizens from being denied the fundamental right to

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[12] Petitioners presented evidence showing that there was racially polarized voting, and Respondents stipulated to the adequacy of that evidence in regard to countywide elections. Pet. App. 129a-130a. Petitioner's expert witness expressed no opinion as to whether the alternative districts were sufficient to overcome the level of polarization present. JA 114-22. Whether the degree of polarization is sufficient to sustain a Section 2 claim, as opposed to whether the polarization exists, may be in question given the Court's holding in *Voinovich*. *Voinovich*, at 155 (Evidence that Black candidates could be elected in districts with 35% Black population insufficient to show polarized voting.).

participate in the political process and to ensure that they have the equal right to elect representatives of their own choosing. Adherence to the 50% rule furthers *that* objective in a constitutional manner by protecting minority citizens from having their votes unfairly diluted. If the 50% rule is abandoned as Petitioners urge, Section 2 will no longer be a shield to protect minority citizens from unequal treatment, it instead will be a tool which permits minority citizens to benefit from special treatment denied to citizens of other races. Adopting the Petitioners' position will result in a race neutral provision of a state constitution which is universally recognized as a valid redistricting criteria being abandoned in order to permit a biracial coalition to elect a candidate of a particular political party. Such a result is not required by Section 2 nor does it further the purposes of the Act.

CONCLUSION

The decision of the North Carolina Supreme Court should be affirmed.

Respectfully submitted,

CARL W. THURMAN III
Counsel of Record
3169 Wrightsville Avenue
Wilmington, NC 28403
(910) 620-3979

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REPLY BRIEF

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GARY BARTLETT, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,
Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

REPLY BRIEF FOR THE PETITIONERS

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

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*Counsel of Record

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ARGUMENT

Respondents argue that Section 2 categorically bars minority voters from proving a Section 2 claim unless the minority group can show that they could constitute a numerical majority in a district. In support of that argument, respondents rely on the text of Section 2, the need for a rule that minimizes the use of race, the principle that Section 2 does not require maximization of minority voting strength, and the need for an administrable standard.

Respondents' arguments are unpersuasive. The text of Section 2 establishes an "opportunity-to-elect" precondition, and that standard can be satisfied by proof that minority voters would have an opportunity to elect representatives of their choice in a coalition district through sufficient crossover voting. Such coalition districts minimize, rather than exacerbate, the use of race in districting and politics. The opportunity-to-elect standard also aligns Section 2 with Section 5; it does not require maximization; and it is fully capable of judicial administration. And, unlike the numerical-majority requirement, the opportunity-to-elect standard prevents blatant efforts to dilute minority voting strength in circumstances in which minority voters could not constitute a majority in a district.[1]

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[1] The State urges adoption of an "opportunity-to-elect" precondition – a test that would protect minority groups from vote dilution when a minority group has the opportunity to elect candidates of choice in a "coalition district" as a result of limited crossover voting. The State uses the term "coalition district" because the Court in *Georgia v. Ashcroft*, 539 U.S. 461,

I. The text of Section 2 imposes an opportunity-to-elect precondition, not a numerical-majority requirement.

Respondents argue that the text of Section 2 requires minority voters to establish that they could constitute a numerical majority in a hypothetical district in order to challenge a jurisdiction's redistricting plan. Resp. Br. 10. The text of Section 2, however, "says nothing about majority-minority districts." *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993). Instead, in order to prove that the challenged plan is the cause of their inability to elect, the text of Section 2 requires minority voters to establish that they would have an "opportunity . . . to elect" candidates of their choice in a proposed district. 42 U.S.C. § 1973(b).

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482 (2003) ("coalitional districts"), and other cases has referred to such districts as ones where minority voters have an opportunity to elect candidates of choice by forming coalitions with other voters. *See, e.g.*, *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 485 (2006) (Souter, J., concurring in part and dissenting in part). Respondents and amici have sometimes used other terms to describe the State's position, such as "crossover district" and "functional majority," terms that, at this point, only obscure the analysis to the extent that they suggest that the State's proposed standard is something other than the one expressed here.

Respondents insist that only a majority can have the opportunity "to elect" candidates of their choice. Resp. Br. 10. That, however, is simply not true. Minority voters who do not constitute a majority in a district may nonetheless have an opportunity "to elect" candidates of their choice by forming coalitions with other voters. For example, if minority voters who vote cohesively constitute 48% of the electorate in a district, and 10% of the other voters in the district regularly vote for the minority's preferred candidates, minority voters would have an "opportunity . . . to elect" candidates of their choice in that district. That such an opportunity exists because of sufficient crossover voting – rather than because minority voters can independently determine the outcome of the election – is irrelevant under the text of Section 2.[2]

Indeed, this Court has repeatedly recognized that minority voters who do not constitute a majority in a district can have the opportunity to elect their

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[2] Additionally, a 50% numerical requirement is not tied to how elections are run in North Carolina or most other States. Under North Carolina law, a candidate can prevail in a party primary with only 40% of the vote. N.C. Gen. Stat. § 163-111. In the general election, there is no minimum percentage – the individual with the highest number of votes is elected to office. N.C. Gen. Stat. § 163-182.15(d). Thus, when more than two candidates are running in the general election (as is frequently the case in state senate and house races in North Carolina), the prevailing candidate needs less than 50% of the vote to win the election.

preferred candidates by forming coalitions with other voters. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court explained that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, *having no need to be a majority within a single district in order to elect candidates of their choice.*" *Id.* at 1020 (emphasis added).

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court reaffirmed that conclusion. In explaining why a jurisdiction covered by Section 5 should have flexibility to create coalition districts, the Court emphasized that "spreading out minority voters" into coalition districts, rather than assigning them to majority-minority districts, "creates more districts *in which minority voters may have the opportunity to elect a candidate of their choice.*" *Id.* at 481 (emphasis added).

As far back as *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court expressed its understanding that minority voters need not constitute a majority in order to have the opportunity to elect their preferred candidates. There, the Court held that the proportional representation achieved by minority voters in a multimember district in which they constituted 36.3% of the voters "reflect[ed] the minority group's *ability to elect its preferred representatives.*" *Id.* at 77. Justice O'Connor, joined by three other Justices, agreed, stating that "when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories." *Id.* at 90 n.1 (O'Connor, J., concurring). She further explained that

"[o]n the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, . . . *it would be able to elect some candidates of its choice.*" *Id.* (emphasis added).

Thus, the text of Section 2 imposes an "opportunity-to-elect" precondition, not a numerical-majority requirement. Respondents' effort to equate the two is unpersuasive.[3]

Unlike respondents, the Solicitor General does not argue that the text of Section 2 imposes a numerical-majority requirement in all cases. Instead,

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[3] The legislative history confirms that conclusion. The Senate Report's list of "typical factors" for proving a claim does not include a requirement that minority voters constitute 50% of the voters in a district. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. That Report also endorses "a searching practical evaluation of the past and present reality," as well as a "functional view of [the] political process." *Id.* at 30 & n.120. And Congress' understanding that an opportunity-to-elect might sometimes require a 65% minority district, *see* U.S. Br. 21 n.7, reflects the application of a functional "opportunity-to-elect" standard rather than a 50% rule.

he argues that the text generally requires a numerical majority, but that the text does not preclude an under-50% claim in two cases: when minority voters could constitute a "near majority" in a district and when district lines reflect intentional discrimination. U.S. Br. 8-17. That position has no firmer grounding in the text than respondents' categorical rule. The precondition created by the statutory text does not ask whether minority voters could constitute a near-majority, or whether district lines reflect intentional discrimination, but whether minority voters would have an "opportunity . . . to elect" in a proposed district.

If, for example, minority voters could constitute 45% of the electorate in a district, and would have the opportunity to elect candidates of choice in that district because of sufficient likely crossover, they have satisfied the statutory opportunity-to-elect precondition. *See* U.S. Brief In Opposition at 21-22, *County of Los Angeles v. Garza*, Nos. 90-849 & A-422 (9th Cir. Sept. 14, 1990). Similarly, if a jurisdiction's districting plan fragments those minority voters into two districts in which they have no opportunity to elect, minority voters have suffered a denial of the opportunity to elect, regardless of whether the fragmentation reflects intentional discrimination or an effort to protect an incumbent. *See LULAC*, 548 U.S. at 439-42. The Solicitor General's strained effort to extrapolate from the text a general rule with two exceptions does not withstand scrutiny.

Similarly unpersuasive is the Solicitor General's contention (U.S. Br. 11) that the text of Section 2 rules out a coalition district claim because it protects "a class

of [minority] citizens," not coalitions. 42 U.S.C. § 1973. When minority voters can elect candidates of their choice in a coalition district, but a jurisdiction instead places them into districts in which they have no such opportunity, the Section 2 rights of *minority voters* are affected. For example, if minority voters constitute less than 50% of the voters in a district, and they have repeatedly elected candidates of their choice from that district, splitting the minority voters into two districts in which they lack any electoral opportunity deprives *minority voters* of the opportunity to elect candidates of their choice. Because coalition district claims seek to prove that *minority voters* have been deprived of an equal opportunity to elect candidates of their choice, such claims fall squarely within the text of Section 2.

Thus, under the statutory text, minority voters can satisfy a precondition for a Section 2 claim by showing that they would have the opportunity to elect candidates of their choice through a coalition with other voters. Neither the categorical 50% rule offered by respondents nor the version of that rule offered by the Solicitor General can be reconciled with the statutory text.[4]

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[4] The North Carolina Supreme Court's judgment embodies a directive that the state legislature may not maintain in the current plan or create in a future plan any Section 2 district that crosses county boundaries unless minority voters constitute 50% of the proposed district. Pet. App. 33a. Acceptance of the Solicitor General's position (i.e., less than 50% may be appropriate in some circumstances) would require reversal of the judgment of the North Carolina

II. The 50% rule heightens the role of race in districting and politics, while the opportunity-to-elect standard limits the use of race to circumstances in which it is necessary to prevent minority vote dilution.

Respondents contend that the opportunity-to-elect standard heightens the role of race in districting, raising constitutional concerns, while the numerical-majority requirement has the opposite effect. Resp. Br. 42-51; *see* U.S. Br. 20-22. In fact, however, the 50% rule injects race into districting and politics in troubling ways, while the opportunity-to-elect standard requires resort to race only when necessary to prevent minority vote dilution.

The 50% rule requires minority voters to satisfy a racial quota as a necessary precondition for receiving

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Supreme Court. Similarly, under the Solicitor General's standard, the North Carolina Supreme Court's ruling that House District 18 is not required by Section 2 would have to be reversed and remanded for consideration of, *inter alia*, racial discrimination in the drawing of Pender County's lines and the maintenance of those discriminatory lines through the Whole County Provision. The county line at issue was created to segregate blacks residing in the Wilmington area (the southern portion of New Hanover County) from whites living in the northern portion of New Hanover County (in what is now Pender County). J.A. 143-44. Respondents have stipulated to this undisputed fact. *Id.*

protection under Section 2. Rather than asking whether, in light of the political realities of a district, minority voters have a realistic opportunity to elect candidates of choice in a proposed district, the 50% rule ignores political realities and requires a simple headcount of minority voters. If the headcount establishes that minority voters exceed 50% of the eligible voters, Section 2 affords protection; if the headcount falls below that minimum, no protection exists.

Moreover, when, as will often be the case, a jurisdiction has a choice between drawing a district that exceeds the 50% minimum and a coalition district that affords the same opportunity to elect, the 50% rule induces jurisdictions to do the former, even though it may require a far more extensive use of race. Under the 50% rule, if the jurisdiction fails to draw a district that exceeds the 50% minimum, it may be subject to Section 2 liability, but if it fails to draw a coalition district, no such liability is possible. That legal regime puts a significant measure of pressure on jurisdictions to avoid liability by packing minority voters into districts that exceed the 50% minimum, rather than drawing coalition districts that use race far less, but still afford an opportunity to elect.

The pressure to draw districts that exceed the 50% minimum can also induce jurisdictions to stray from the use of traditional race-neutral districting principles. The maps included in the League of Women Voters amicus brief provide visible evidence that jurisdictions that have sought to draw districts that exceed a 50% minimum have sometimes made extensive use of race, while failing to follow traditional

districting criteria. League of Women Voters Br. 31-38, 1a-3a. In contrast, when those very same jurisdictions sought to establish coalition districts that would afford minority voters an equal opportunity to elect representatives of their choice, they were able to do so while complying with other traditional redistricting criteria. *Id.* Those maps confirm that districts drawn to afford an opportunity to elect, rather than to exceed a 50% minimum, can make far less extensive use of race.

Coalition districts also tend to foster political alliances across racial lines, hastening the time when race will not be a factor in politics at all. *De Grandy*, 512 U.S. at 1020. By contrast, districts that are packed to exceed a 50% quota can promote and entrench racial politics.

In arguing that the opportunity-to-elect standard will magnify the role of race in redistricting, respondents simply ignore the troubling ways in which the 50% rule heightens the role of race in districting decisions and politics, as well as how coalition districts minimize them. Instead, they argue that the opportunity-to-elect standard will heighten the use of race, because it will increase the absolute number of districts that must be drawn to comply with Section 2, and that, in turn, will increase both the occasions on which jurisdictions will have to consider that issue and the amount of Section 2 litigation. Resp. Br. 28-29; *see* U.S. Br. 21-22, 25.

Because there are circumstances in which a jurisdiction could draw a reasonably compact coalition district, but not a reasonably compact majority-

minority district, the opportunity-to-elect standard would increase to some extent the number of Section 2-required districts. Respondents' argument based on that increase, however, misses an essential difference between this use of race and others. Jurisdictions will be obligated to use race to draw coalition districts only when it is necessary to achieve Congress' compelling objective of affording minority voters an equal opportunity to elect representatives of their choice.

Moreover, the consequence of adopting the 50% rule in order to reduce the number of districts that must be drawn to comply with Section 2 is to allow practices that blatantly dilute minority voting strength to go unremedied. Under the 50% rule, a jurisdiction could demolish a district in which minority voters had repeatedly elected their preferred candidates in order to achieve partisan ends or to protect an incumbent, as long as minority voters could not constitute a majority in a district. The opportunity-to-elect standard prevents these vote dilution practices from occurring.

Respondents also vastly overstate the extent to which the opportunity-to-elect standard would increase the number of Section 2-required districts. The requirements for such a coalition district claim are demanding. Minority voters would not only have to meet the difficult burden of showing that they could elect candidates of their choice in a proposed district, they would also have to show that the district is reasonably compact, that they are politically cohesive, that whites usually vote sufficiently as a bloc to defeat their preferred candidates in the challenged district, and, in most circumstances, that minority voters are not already electing candidates in proportion to the

percentage in the population. *De Grandy*, 512 U.S. at 1013-1016. Other factors may also preclude minority voters from establishing that, under the totality of circumstances, a violation of Section 2 has occurred. *Id.* at 1011 (noting that the totality of circumstances includes "the extent of the opportunities minority voters enjoy to participate in the political processes"); *id.* at 1010 n.9 (setting forth a list of factors that are relevant to the totality of circumstances).

This Court's cases that have reserved the question whether minority voters can bring a coalition district claim attest to the difficulty of proving such a claim. In those cases, this Court rejected coalition district claims on four different grounds: that minority voters failed to establish white bloc voting, *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), that minority voters failed to establish minority political cohesion, *Growe v. Emison*, 507 U.S. 25, 41-42 (1993), that, in light of proportionality, minority voters failed to show that they were deprived of an equal opportunity to elect, *De Grandy*, 512 U.S. at 1013-1014, and that minority voters failed to prove that the district at issue afforded an opportunity to elect. *LULAC*, 548 U.S. at 443-446.

Because a coalition district claim would be difficult to prove in so many cases, there is no basis for respondents' prediction that adopting the opportunity-to-elect precondition will provoke a "morass of litigation." Resp. Br. 28. Certainly, the current experience in jurisdictions operating under that standard provides no support for respondents' prediction. Although the New Jersey Supreme Court adopted the opportunity-to-elect standard five years

ago, there is no evidence of a rash of litigation in that State. *See McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003), *cert. denied*, 540 U.S. 1107 (2004). Similarly, although the First Circuit opened up the possibility of an under-50% claim four years ago, *see Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), there is no evidence of a morass of litigation in that circuit.

Moreover, while States are the parties that are most likely to be concerned about an increase in Section 2 litigation, no State has filed an amicus brief in this case arguing that the Court should adopt the 50% rule. Indeed, numerous States with significant minority populations have joined an amicus brief urging the Court to reject the 50% rule. States Br. 27-30. The only State entity taking a contrary view is the Florida House of Representatives, and its amicus brief was not even joined by the Florida Senate.

Whatever the exact number of additional Section 2-required districts, however, the critical points are these: Where it is possible to draw either a coalition district or a majority-minority district, drawing a coalition district significantly reduces the role of race in districting and politics. And the limited increase in the number of Section 2-required districts caused by the opportunity-to-elect standard is necessary to realize Congress' compelling goal of preventing jurisdictions from depriving minority voters of an equal opportunity to elect representatives of their choice.

III. The opportunity-to-elect precondition does not require maximization of minority voting strength.

Respondents argue that the opportunity-to-elect standard requires jurisdictions to maximize minority voting strength. Resp. Br. 32; *see* U.S. Br. 6, 18. That argument reflects a fundamental misunderstanding of that standard.

The statutory opportunity-to-elect standard does not require jurisdictions to draw as many opportunity-to-elect districts as possible. Instead, it affects only one precondition for establishing a Section 2 claim. Rather than having to show in every case that minority voters could constitute a numerical majority in a district, the opportunity-to-elect standard allows minority voters to satisfy a Section 2 precondition by showing that they would have an opportunity to elect representatives of their choice because of sufficient crossover. To prevail on a coalition district claim, minority voters would still have to prove the remaining preconditions of compactness, minority cohesion, and non-minority bloc voting; in most cases they would have to prove the absence of proportionality; and in all cases they would have to prove that the totality of circumstances establishes a Section 2 violation.

The end result is that a jurisdiction would not be required to maximize the number of coalition districts. Instead, it would be required to draw such a district only when its failure to do so would, under the totality of circumstances, deprive minority voters of an equal opportunity to elect representatives of their choice.

Rather than recognizing that proof of an opportunity to elect would simply establish one necessary element of a claim, respondents' maximization argument treats satisfaction of that one precondition as if it were sufficient by itself to prove a Section 2 violation. Under that mode of analysis, the 50% rule requires jurisdictions to maximize the number of districts in which minority voters constitute a majority in a district. Neither, in fact, is true. Both the opportunity-to-elect standard and the 50% rule affect one precondition of a Section 2 claim. Neither requires maximization of minority voting strength.

IV. The opportunity-to-elect precondition is administrable.

Respondents argue that an opportunity-to-elect precondition is not judicially manageable and that a numerical-majority requirement therefore must be adopted instead. Resp. Br. 28-31; *see* U.S. Br. 22-25. As discussed *infra* pp. 20-22, in *Georgia v. Ashcroft*, the Court held that a court resolving a retrogression inquiry under Section 5 is required to consider whether a State has created coalition districts in which minority voters "may have the opportunity to elect a candidate of their choice." 539 U.S. at 481. The Court would not have required that inquiry if it were not judicially manageable.

Moreover, that standard is, in fact, judicially manageable. Of critical importance, the inquiry into whether minority voters would have the opportunity to elect in a coalition district is similar to the inquiry that is required by the third *Gingles* precondition. That precondition requires a court to assess whether, in the

absence of special circumstances, such as incumbency, non-minority voters usually "vote[] sufficiently as a bloc . . . to defeat the minority's preferred candidate." 478 U.S. at 51.

To satisfy that precondition, plaintiffs typically perform an analysis of past election results to estimate the percentage of minority voters and the percentage of non-minority voters who voted for the minority's preferred candidate. *See* 478 U.S. at 81 (e.g., estimating that 89% of blacks and 10% of whites voted for a particular minority candidate). Those two numbers are then used as a basis for estimating whether non-minority voters would usually defeat the minority-preferred candidate in the challenged district given the percentage of minority and non-minority voters in that district. (In a 35% minority district, the minority-preferred candidate in the above example would have lost with 38% of the vote (89% of 35% = 31.2%, and 10% of 65% = 6.5%; resulting in 31.2% + 6.5% = 37.7%)).

That same kind of analysis can be used to determine whether minority voters would have an opportunity to elect a representative of choice in a proposed coalition district. If, for example, past election results show that the minority-preferred candidate would have lost in the proposed district in all the elections analyzed, minority voters would likely not have an opportunity to elect in the proposed district. If, by contrast, the minority-preferred candidate would have won in all the elections analyzed, minority voters likely would have an opportunity to elect in that district. Of course, other factors, such as incumbency, can significantly affect the analysis. And some

previous elections may be far more probative than others. But that is equally true for the inquiry into the third *Gingles* precondition. *See Gingles*, 478 U.S. at 57.

The Solicitor General contends that the two inquiries are different, because the inquiry into the third *Gingles* precondition is backward-looking, while the inquiry into the opportunity-to-elect precondition is predictive. U.S. Br. 22-23. When a plaintiff is challenging a new district, however, that is not true. In order to prove the third precondition in such cases, the plaintiff must show that, in light of past election results, it is predictable that whites in the future will usually defeat the minority-preferred candidate in the new district. Proving the opportunity-to-elect precondition is no different.

Of course, in some cases, plaintiffs' evidence may be too speculative to reach a conclusion that minority voters would have an opportunity to elect. As the party bearing the burden of proof, plaintiffs could not prevail in those cases, just as they could not prevail if their evidence on the third precondition is too speculative. In other cases, however, the evidence may supply a firm basis for concluding that minority voters would have an opportunity to elect candidates in a proposed district. In such cases, plaintiffs will have satisfied the opportunity-to-elect precondition.

The Solicitor General worries that the States will not be able to determine their Section 2 responsibilities under an opportunity-to-elect standard. U.S. Br. 24-25. But the State legislature in this case was able to make that judgment. Similarly, other

States have had no trouble determining when a coalition district will afford minority voters an opportunity to elect. *See* League of Women Voters Br. 32-38; Bishop Br. 4-5. And the State amici, who are in a position to know whether compliance would be a problem, have raised no such concern.

If there were distinct concerns of administrability raised by coalition district claims, the appropriate response would not be to foreclose all meritorious claims. Instead, it would be to require some further objective indicator that confirms that minority voters have an opportunity to elect in the proposed district. The presence of such a further objective factor would serve both to increase the level of confidence that minority voters truly have an opportunity to elect in the proposed district and simultaneously establish objective limits for a coalition district claim.

For example, one such objective factor would be that a minority preferred candidate has already been elected in the proposed district. If the minority-preferred candidate has already won in the district, it is difficult to reject as speculative the claim that minority voters have an opportunity to elect in the district.

A second confirming factor would be that minority voters constitute a majority of voters in a party primary, and that party is the dominant party in the district. When minority voters constitute a majority in a party primary, it is likely that they have an opportunity to nominate the candidate of their choice. And when that party is the dominant party in

the district, there is ordinarily a realistic chance that the party's nominee will receive sufficient crossover votes to be elected.

A third confirming factor would be that the minority group is significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district. If the minority group is significantly larger in size than the crossover group, it is reasonably likely that it can exercise control over the selection of the coalition candidate. By contrast, if the minority group is smaller in size than the asserted crossover group, it is more likely that minority voters may have only the power to influence the election of the candidate preferred by that group.

The point is not that any one of these factors is necessary or sufficient to prove a coalition district claim. Rather the point is that when a statistical analysis based on past election results is combined with one or more of these factors, it can provide a firm basis for concluding that minority voters have an opportunity to elect in the proposed district. At the very least, when such evidence is present, the inquiry into whether plaintiffs have satisfied the opportunity-to-elect precondition is judicially manageable and objectively limited. There is therefore no basis for supplanting that standard with an extra-textual numerical-majority requirement that forecloses clearly meritorious claims.

V. The opportunity-to-elect standard aligns Section 2 with Section 5.

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), nine Justices concluded that coalition districts can afford minority voters the opportunity to elect candidates of their choice and that the existence of those districts should therefore be considered in deciding whether a jurisdiction's districting plan has caused a retrogression in minority voting strength in violation of Section 5. *Id.* at 480-82 (majority opinion); *id.* at 492-93 (Souter, J., concurring in part and dissenting in part). The Court equated an "opportunity to elect" with an "ability to elect." *Id.* at 480 (majority opinion) (referring to "ability to elect"); *id.* at 481 (referring to "opportunity to elect"). Congress subsequently codified the Court's unanimous conclusion by providing that the retrogression inquiry should focus exclusively on whether a plan has the effect of diminishing a minority group's "ability . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b).[5]

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[5] Relying on a Senate Report that was filed a week after the Senate adopted the 2006 Amendments, and that was not available to Senators at the time of floor debate, amicus Florida House of Representatives argues that as a result of the 2006 Amendments, coalition districts are not protected in the redistricting process. Because that Report contradicts the text of the Amendments, particularly when read in light of *Georgia v. Ashcroft*, it is irrelevant to the statutory analysis. In any event, coming at the time that it did, such a report is the very antithesis of the kind of legislative history that could be relevant in

Respondents contend that *Georgia v. Ashcroft* is irrelevant to the analysis here because it involved an interpretation of Section 5, rather than Section 2. Resp. Br. 39-42; *see* U.S. Br. 26. But while Section 5 and Section 2 differ in certain respects, they also overlap in significant respects. For example, the extent of minority cohesion and white bloc voting are obviously relevant to both the Section 2 and Section 5 inquiries. The same is true of proof that minority voters would have the opportunity to elect candidates of their choice in a coalition district.

After all, both statutes are concerned with the dilution of minority voting strength. And while the sections use different measures of dilution – Section 5 uses retrogression, while Section 2 uses an equal-opportunity-to-elect analysis – nothing about that difference suggests that coalition districts should be relevant to Section 5 but not to Section 2. That is particularly true in light of the Court's holding in *Georgia v. Ashcroft* that coalition districts can afford

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interpreting the meaning of a statute. *See* S. Rep. No. 109-295 (2006) (additional comments of Senator Leahy, *et al.*). By contrast, the contemporaneous legislative history is consistent with the text of the statute. *See* H.R. Rep. No. 109-478 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5."); *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 216-51 (2007) (discussing 2006 Amendments).

minority voters "an opportunity to elect candidates of their choice," 539 U.S. at 481, language that tracks important language in Section 2. And it is also true in light of Congress' use of the phrase "ability to elect," a phrase that the Court in *Georgia v. Ashcroft* equated with "opportunity to elect."

Moreover, drawing a distinction between Section 2 and Section 5 in this respect simply makes no sense. If a jurisdiction covered by Section 5 abolishes a coalition district and replaces it with two districts in which minority voters have no "ability to elect" candidates of choice, it would constitute a violation of Section 5. Under the 50% rule, however, a jurisdiction not covered by Section 5 could take precisely the same action, and minority voters could not even attempt to prove that, under the totality of circumstances, the jurisdiction denied minority voters an equal opportunity to elect representatives of their choice. Nothing in the text or purposes of the two sections justifies that anomalous result.

VI. Adopting the opportunity-to-elect precondition would resolve a question the Court has reserved; it would not reverse existing law.

Respondents contend that adopting the opportunity-to-elect standard would constitute a radical change in established Section 2 jurisprudence. Resp. Br. 39. Adopting that standard, however, would simply resolve a question that the Court has long reserved; it would not reverse established law.

Indeed, since the decision in *Gingles*, the Court has repeatedly reserved the question whether minority voters could satisfy the first precondition by showing that they would have the opportunity to elect candidates of their choice in a coalition district through sufficient crossover voting. *Voinovich*, 507 U.S. at 146, 154, 158; *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); *De Grandy*, 512 U.S. at 1008-09; *LULAC*, 548 U.S. at 443. Not one of those cases suggested in any way that such a claim falls outside the scope of Section 2. Moreover, in *De Grandy*, the Court reformulated the first *Gingles* precondition in a way that readily accommodates a coalition district claim, stating that "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with *a sufficiently large minority population to elect candidates of its choice*." 512 U.S. at 1008 (emphasis added). And in *Georgia v. Ashcroft*, the Court expressly held that coalition districts are relevant to the Section 5 vote dilution inquiry because they afford an "opportunity to elect," distinctly raising the possibility that the Court would reach the same conclusion with respect to Section 2. That line of decisions has given jurisdictions fair warning that the question presented in this case is an open one and that this Court might ultimately hold that Section 2 encompasses a coalition district claim.

Respondents argue that permitting a coalition district claim would constitute a radical change in the law because a number of circuits have held that Section 2 incorporates a numerical-majority requirement. Resp. Br. 20-25. Not all lower courts

that have examined the question, however, have reached that conclusion. *Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004) (en banc); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1321-22 & n.56 (S.D. Fla. 2002) (three-judge court); *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court); *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three judge court); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853, 857 (N.J. 2003). The Department of Justice, which has responsibility for enforcing Section 2, has also repeatedly made clear that it does not believe that Section 2 creates an absolute 50% rule. *See* U.S. Br. 13-16. More fundamentally, it is this Court, rather than the lower courts, that determines the state of the law, and this Court has repeatedly chosen to leave the issue open.

Respondents also err in relying on Congress' silence as evidence that Congress approves of the 50% rule. *See* Resp. Br. 47. The silence of a subsequent Congress has no bearing on the meaning of an earlier statute. *Kimbrough v. United States*, 128 S. Ct. 558, 573 (2007) (congressional inaction is a poor indicator of congressional intent); *United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). And even if such congressional silence were relevant, it could not constitute approval of the 50% rule when there is no consensus in the lower courts on that issue, and, more importantly, this Court has repeatedly reserved the question.

VII. Respondents waived their claim that an alternative district would afford an opportunity to elect.

Respondents do not challenge the three-judge panel's finding that minority voters have an opportunity to elect candidates of their choice in House District 18. That is not surprising. The evidence overwhelmingly supports the state legislature's judgment that minority voters have an opportunity to elect candidates of their choice from that district. *See* Pet. Br. 30-32. Indeed, the legislature's foresight has been confirmed, as House District 18 has now repeatedly nominated and elected African-American candidates preferred by African-American voters.

Respondents assert, however, that an alternative to House District 18 could have been drawn that would have provided African-Americans with an opportunity to elect candidates of choice, while cutting fewer county lines. Resp. Br. 7-9, 49 n.11, 50. The existence of such a district, respondents claim, establishes that House District 18 is not required by Section 2.

Respondents waived that claim, and this Court therefore should not consider it. The three-judge panel found that the State had established each of the three *Gingles* preconditions, and that the totality of circumstances established that House District 18 was required by Section 2. Pet. App. 9a, 115a. Respondents could have attempted to challenge that finding on the ground that their proposed alternative afforded minority voters an opportunity to elect. Respondents, however, chose not to appeal on that

ground. Indeed, respondents' brief to the North Carolina Supreme Court failed to make any reference whatsoever to a proposed alternative district. Instead, respondents challenged the panel's judgment on a single ground – that a Section 2 claim invariably requires proof that minority voters could constitute a numerical majority in a district, and that House District 18 did not contain such a majority. The North Carolina Supreme Court agreed with respondents and reversed the three-judge panel on that basis without passing on any other aspect of the panel's ruling. Pet. App. 27a.

Under North Carolina law, an issue that is not preserved in the appellate courts by a specific assignment of error and by briefing to the appellate court is deemed abandoned. *See, e.g., Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007); *State v. Wiley*, 565 S.E.2d 22, 32 (N.C. 2002), *cert. denied*, 537 U.S. 1117 (2003). That rule is directly applicable here.

Because respondents' alternative district argument was neither pressed nor passed on below, the Court should not consider it. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). This is particularly true given that respondents failed to raise the issue in the opposition to the petition for writ of certiorari. Sup. Ct. R. 15.2; *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998).

In any event, respondents' argument ignores the record. That alternative has an appreciably lower percentage of minority voters, and the State offered evidence that such a district would not provide African-Americans with an opportunity to elect their

candidates of choice. *See, e.g.*, J.A. 42-43, 73. Respondents point to certain election results as support for their claim. But the State's expert concluded that those election results had limited probative value, Engstrom Depo. 6-9, and respondents offered no contrary expert evidence. Respondents also stipulated that "the evidence presented by the defendants is sufficient to support a finding of fact that the racial difference in the preference of voters results in the white majority voting sufficiently as a block to usually enable it to defeat the minority's preferred candidate." Pet. App. 130. Finally, respondents' alternative plan would have resulted in an incumbent minority-preferred candidate being placed in the same district as a non-minority incumbent. *See* N.C. S. Ct. Record on Appeal 30. That aspect of respondents' alternative plan would adversely affect the opportunity of minority voters to elect their candidate of choice. In light of these factors and others, it is hardly surprising that respondents chose not to challenge the three-judge panel's ruling based on their alternative district. While respondents seek to resurrect that claim, that effort is both too late and without merit.

* * * * *

Coalition districts are sometimes necessary to fulfill Section 2's compelling objective of ensuring that minority voters are not deprived of an equal opportunity to elect representatives of their choice. At the same time, they offer the promise of helping to facilitate a transition to a time when race will no longer matter in elections. The 50% rule adopted by the North Carolina Supreme Court places a serious obstacle in the way of that progress. That rule has no

basis in the statutory text and is inconsistent with this Court's decisions construing the Voting Rights Act.

CONCLUSION

The decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted.

WALTER DELLINGER
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.*
GRAYSON G. KELLEY
TIARE B. SMILEY
ALEXANDER MCC. PETERS
SUSAN K. NICHOLS
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

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*Counsel of Record

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SUPREME COURT, U.S.

In the Supreme Court of the United States

GARY BARTLETT, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL., PETITIONERS

v.

DWIGHT STRICKLAND, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
KANNON K. SHANMUGAM
Assistant to the Solicitor General
DIANA K. FLYNN
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, obligated North Carolina to draw House District 18, in which African Americans constituted 39.36% of the voting-age population.

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In the Supreme Court of the United States

No. 07-689

GARY BARTLETT, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

Petitioners claim that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, required North Carolina to draw the legislative district at issue in this case, in which African Americans constituted 39.36% of the voting-age population. Because the United States has primary responsibility for enforcing Section 2, see 42 U.S.C. 1973j(d), the Court's decision in this case could impact federal enforcement efforts. The United States has participated in all of the Court's cases involving the interpretation of amended Section 2.

STATEMENT

1. Section 2(a) of the Voting Rights Act of 1965 (Voting Rights Act), as amended by Congress in 1982, pro-

hibits any "standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a). Section 2(b), which was added in 1982, provides that Section 2(a) is violated when, "based on the totality of circumstances, it is shown that * * * members of a class of citizens protected by subsection (a) of this section * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Section 2(b) also provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Ibid.*

Vote dilution occurs when a voting practice "operate[s] to minimize or cancel out the voting strength of * * * elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court held that, as "necessary preconditions" to proving a Section 2 vote-dilution claim, a plaintiff must show (1) that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Id.* at 50-51. If a plaintiff satisfies the *Gingles* preconditions, a court must then consider the totality of circumstances, "based upon a searching practical evaluation of the past and present reality," to determine whether Section 2 has been violated. *Id.* at 79 (internal quotation marks and citation omitted).

2. Following the 2000 census, the North Carolina General Assembly adopted a series of redistricting plans for its two houses, the Senate and the House of Representatives. In 2003, after its initial plans were invalidated under state law, the General Assembly adopted the plan at issue in this case. The North Carolina Constitution provides that "[n]o county shall be divided" in the formation of legislative districts. See N.C. Const. Art. II, §§ 3(3), 5(3). The North Carolina Supreme Court has held, however, that the General Assembly may divide a county into multiple districts where it is necessary to do so in order to comply with federal law, including the Voting Rights Act. See *Stephenson* v. *Bartlett*, 562 S.E.2d 377, 396-397 (2002).

As part of the 2003 redistricting plan, the General Assembly divided Pender County, which is located in southeastern North Carolina, into two House districts. The district at issue in this case, House District 18, includes portions of Pender County and of a larger adjoining county to the south, New Hanover County. The evidence presented below indicates that African Americans constitute 39.36% of the voting-age population of House District 18. Pet. App. 69a. The evidence also indicates that it would be possible to draw a House district that keeps Pender County together with an African American voting-age population of 35.33%. J.A. 73.[1]

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[1] Forty North Carolina counties, but not Pender County or New Hanover County, are covered jurisdictions subject to the preclearance requirement in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51, App. North Carolina submitted the 2003 redistricting plan for preclearance, and the Attorney General declined to interpose an objection. Preclearance under Section 5 does not preclude a subsequent action under Section 2. See 28 C.F.R. 51.55(b); *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

3. Petitioners are the Governor of North Carolina and other state officials; respondents are three members of the Pender County Board of Commissioners. On May 14, 2004, respondents and others brought suit in Wake County Superior Court, contending that, by splitting Pender County into two House districts, the 2003 redistricting plan violated the whole-county provisions of the North Carolina Constitution. J.A. 5-14. Petitioners moved for summary judgment, asserting that it was necessary for the General Assembly to draw House District 18 as it did in order to avoid violating Section 2 of the Voting Rights Act. Respondents, in turn, moved for summary judgment, contending, *inter alia*, that House District 18 failed to satisfy the first *Gingles* precondition because it did not contain a majority African American voting-age population. Pet. App. 72a-74a.

The trial court granted partial summary judgment to petitioners. Pet. App. 51a-105a. The court concluded that, while "House District 18 is *not* a majority-minority district because of the number of African American voters located therein," *id.* at 90a, it was "a *de facto* black majority district * * * sufficient to meet the first prong of *Gingles*." *Id.* at 96a-97a. The court also concluded that the second *Gingles* precondition—that the minority group be politically cohesive—was satisfied. *Id.* at 99a. Respondents subsequently stipulated that the third *Gingles* precondition—that the majority group vote sufficiently as a bloc to defeat the minority group's preferred candidate—was met. *Id.* at 130a-131a. The trial court concluded that the ultimate totality-of-the-circumstances test was also satisfied, and accordingly entered judgment for petitioners. *Id.* at 106a-120a.

4. The North Carolina Supreme Court reversed. Pet. App. 1a-50a. The court held that "a minority group

must constitute a numerical majority of the voting-age population in the area under consideration before Section 2 of the [Voting Rights Act] requires the creation of a legislative district to prevent dilution of the votes of that minority group." *Id.* at 19a. Because "the African-American minority group in House District 18 does not constitute a numerical majority of citizens of voting age," the court determined that it was unnecessary for the General Assembly to draw House District 18 in the manner it did in order to comply with Section 2. *Id.* at 27a. The court therefore ordered the General Assembly to redraw the district. *Id.* at 34a.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act did not obligate North Carolina to draw House District 18, in which African Americans constitute approximately 39% of the voting-age population.

A. To establish a Section 2 claim, a plaintiff must generally show that members of a minority group can constitute a majority of the relevant population in a proposed district. That requirement follows from this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), as well as the text of Section 2. Where a politically cohesive minority group constitutes a numerical majority in a proposed district, the group will have the "opportunity to elect" a candidate of its own choice. And where a jurisdiction fails to adopt such a proposed district, it can fairly be presumed that the jurisdiction is not providing an *equal* opportunity to the minority group to elect the representative of its choice—at least where, in the absence of such a district, majority-bloc voting would defeat the minority group's preferred candidate. That general rule provides legislatures drawing

districts, and courts reviewing them, with a clear and administrable standard for applying Section 2.

B. While it correctly recognized the majority-minority requirement, the North Carolina Supreme Court went further than necessary in this case by stating that the requirement is absolute. The United States has previously explained that the general majority-minority requirement may be relaxed in two situations. The first is where a plaintiff shows that a challenged voting practice was adopted with discriminatory intent. Such a showing tends to suggest that a jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice. There is no allegation in this case of such an intent. The second is where the minority group is substantial in size yet just short of a majority. That adjustment accounts for the fact that census data may be imprecise and that population is a fluid, not static, concept. The minority group at issue here—at 39.36% of the voting-age population—constitutes far less than a majority in the proposed district. To decide this case, therefore, it was not necessary for the North Carolina Supreme Court to state that a numerical majority is *always* required.

C. Petitioners, who bear the burden of persuasion on the Section 2 issue in this case, have not shown that House District 18 is required by Section 2. In particular, petitioners' proposed "functional majority" approach is unsustainable. Such an approach is inconsistent not only with the *Gingles* framework, but with the text of Section 2, which grants minority groups the right to *equal* electoral opportunity, not the right to *maximize* electoral opportunity. In addition, such a "functional majority" test would make race a predominant factor in many redistricting decisions, thus raising constitutional

concerns identified by this Court. Likewise, it would require district lines to be drawn based on a complex, predictive inquiry into how voters in a proposed district would vote in future elections with unknown candidates. That inquiry not only would place legislatures in an untenable position in deciding whether a given district was required by Section 2, but also trigger perpetual cycles of Section 2 litigation. In the absence of any indication that Congress intended to adopt such a regime, the Court should decline to impose it.

D. If this Court nevertheless adopts petitioners' "functional majority" approach, it may wish to remand for further proceedings, including factfinding as to the likelihood that African Americans would be able to elect a candidate of choice in the proposed 39% African American district, as opposed to the 35% district that could have been drawn in compliance with state law.

ARGUMENT

SECTION 2 OF THE VOTING RIGHTS ACT DID NOT COMPEL NORTH CAROLINA TO DRAW HOUSE DISTRICT 18

Nothing in the Voting Rights Act of 1965 prevented North Carolina from drawing House District 18 with an approximately 39% African American voting-age population. And the United States certainly supports efforts to draw legislative districts in a manner that will provide equal electoral opportunities for all voters, regardless of race, including districts in which minority voters constitute less than a majority but nonetheless may carry significant political clout because of coalitions with voters from other minority groups or "crossover" voting by members of the majority group. This case arises, however, because North Carolina's own law against splitting counties in redistricting prevented the state legislature

from creating the district that it desired. Rather than complying with that law and drawing a district with a 35% African American voting-age population, North Carolina invoked Section 2 of the Voting Rights Act and argued that Section 2 *required* it to draw House District 18 with a 39% African American voting-age population. That position should be rejected.[2]

A. To Assert A Valid Claim, A Section 2 Plaintiff Ordinarily Must Show That Members Of A Minority Group Would Constitute A Majority In A Proposed District

1. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court held that, as "necessary preconditions" to proving that the use of multi-member districts constituted impermissible vote dilution under Section 2, a plaintiff must show (1) that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority

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[2] Districts in which members of a minority group do not constitute a numerical majority have variously been described as "crossover," "coalition," and "influence" districts. Like the decision below, see Pet. App. 18a-19a, this brief uses "crossover" district to refer to a district in which the preferred candidate of voters from one minority group can be elected only with "crossover" votes from other voters. A "coalition" district, by contrast, is one in which voters from *two* minority groups could be said to form a "coalition" to elect the representative of their choice. There is no claim in this case that House District 18 was a "coalition" district. An "influence" district is one in which the preferred candidate of voters from a minority group cannot be elected, but voters from the minority group can nevertheless influence the outcome of the election. In *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) (*LULAC*), a majority of this Court agreed that Section 2 vote-dilution claims involving "influence" districts are not cognizable. See *id.* at 445 (opinion of Kennedy, J.); *id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Id.* at 50-51. The Court has held that the *Gingles* preconditions apply with at least as much force to a claim that a single-member districting plan gives rise to impermissible vote dilution. *Growe* v. *Emison*, 507 U.S. 25, 40 (1993).

Both in *Gingles* itself and in numerous later cases, this Court has reserved the question whether there are any circumstances in which a plaintiff may assert a Section 2 vote-dilution claim without showing that a district could be drawn in which members of a minority group would constitute a numerical majority. See *Gingles*, 478 U.S. at 46 n.12; *Growe*, 507 U.S. at 41 n.5; *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993); *Johnson* v. *De Grandy*, 512 U.S. 997, 1009 (1994); *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 443 (2006) (*LULAC*) (opinion of Kennedy, J.). The federal appellate courts that have considered the issue, however, have consistently held that a plaintiff must show that a majority-minority district could be drawn in order to satisfy the first *Gingles* precondition and assert a valid Section 2 vote-dilution claim. See, *e.g.*, *Hall* v. *Virginia*, 385 F.3d 421, 427-430 (4th Cir. 2004), cert. denied, 544 U.S. 961 (2005); *Valdespino* v. *Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-853 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000); *Cousin* v. *Sundquist*, 145 F.3d 818, 828-829 (6th Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1311-1312 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989).

In the decades since the Voting Rights Act was passed, no federal appellate court has held that Section 2 requires the creation of a district like the one at issue

here, in which the minority group constitutes substantially less than a majority of the voting-age population. In *Metts* v. *Murphy*, 363 F.3d 8 (2004) (en banc) (per curiam), the First Circuit refused, at the motion-to-dismiss stage, to "foreclose the *possibility* that a section 2 claim can ever be made out" where a majority-minority district could not be drawn. *Id.* at 11 (emphasis added). The court stopped short, however, of holding that Section 2 required the creation of such a district.

2. In prior cases before this Court, the United States has "agree[d] with those courts that have rejected" the assumption "that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." U.S. Br. at 16, *Voinovich*, *supra* (No. 91-1618); see U.S. Br. at 7, *Growe*, *supra* (No. 91-1420); U.S. Br. at 18-20, *LULAC*, *supra* (Nos. 05-204, 05-276 & 05-439). The general requirement that a plaintiff bringing a Section 2 vote-dilution claim must show that members of a minority group would constitute a numerical majority in a proposed district is supported by two principal considerations.

a. The majority-minority requirement squares with the text of Section 2. If a minority group constitutes a numerical majority in a proposed district (and is politically cohesive), the group will have an "opportunity * * * to elect" a representative of its own choice without support from other groups. See *Growe*, 507 U.S. at 40. If the preferred candidate of voters from a minority group can be elected only with "crossover" votes from the majority group, however, members of the minority group—*i.e.*, "members of a class of citizens protected by [Section 2]"—would not, in ordinary parlance, be deprived of the opportunity to "*elect* representatives of *their* choice." 42 U.S.C. 1973(b) (emphases added).

Rather, as Justice Brennan observed for the Court in *Gingles*, when the minority group "could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the [challenged voting practice]." 478 U.S. at 50 n.17.

When a minority group must rely on "crossover" votes, the prevailing candidate would be elected not by a majority composed of voters from that group, but by a coalition of voters from that group and other voters—and that *coalition* (as opposed to the minority group) would be the only group deprived of the opportunity to elect the representative of its choice if a proposed "crossover" district were not adopted. Such a coalition of minority and non-minority voters is not "a class of citizens protected by [Section 2]." 42 U.S.C. 1973(b). Thus, this Court has recognized that, where the majority-minority requirement is not satisfied, minority voters "cannot claim to have been injured by [the challenged] structure or practice," *Gingles*, 478 U.S. at 50 n.17, and "there neither has been a wrong nor can be a remedy," *Growe*, 507 U.S. at 41.

In addition, because it is highly likely that voters from a politically cohesive minority group would elect a representative of their choice from a proposed district in which they constitute a majority, it can fairly be presumed that the failure to adopt such a district would deprive those voters of an *equal* opportunity to elect the representative of their choice—at least where, in the absence of such a district, the majority has voted sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Together with the other *Gingles* preconditions, therefore, the threshold majority-minority requirement helps courts to winnow out those cases in

which there is no substantial likelihood that a jurisdiction is affording minority voters "less opportunity [than majority voters] * * * to elect representatives of their choice." 42 U.S.C. 1973(b).[3]

b. Like the other *Gingles* preconditions, the majority-minority requirement also provides a clear and administrable threshold standard for applying Section 2. As lower courts have noted, such a standard furthers "interests in clarity and uniformity" in the application of Section 2. *McNeil*, 851 F.2d at 944. That is true not only for the courts, but also for legislatures that must draw districts in compliance with Section 2 and thus must look to this Court's precedents for guidance. Even those members of the Court who have criticized the majority-minority requirement have acknowledged the need for a "clear-edged rule" at the threshold of the Section 2 inquiry. *LULAC*, 548 U.S. at 485 (Souter, J., concurring in part and dissenting in part).

Under the majority-minority requirement, one need only determine whether members of a minority group

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[3] Petitioners contend (Br. 32-34) that the majority-minority requirement is inconsistent with Section 2's directive that a court should consider "the totality of circumstances" in determining whether members of a minority group have been deprived of an equal opportunity to elect the representative of their choice. 42 U.S.C. 1973(b). This Court has made clear, however, that courts should assess the *Gingles* preconditions *before* analyzing the totality of circumstances. See, *e.g.*, *LULAC*, 548 U.S. at 425-427. Thus, Section 2's "totality of circumstances" language imposes an additional, not alternative, requirement. In addition, as discussed below, the United States has previously explained that the majority-minority requirement may be relaxed in particular situations. See pp. 13-17, *infra*. Those exceptions permit the consideration of additional factors, depending on the "nature of the claim," and thus prevent a "mechanical[]" application of the majority-minority rule. *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994) (citation omitted).

would constitute more than 50% of the relevant population in a proposed district. See *LULAC*, 548 U.S. at 429 (suggesting that the relevant population is the citizen voting-age population). In the vast majority of cases, that inquiry will be straightforward. Petitioners suggest (Br. 41-42) that such a requirement may be difficult to administer because, insofar as the relevant population is the citizen voting-age population, data concerning citizenship status may not be readily available. Where that is the case, however, a plaintiff may simply present evidence that members of a minority group could constitute a numerical majority of the *overall* voting-age population—as, indeed, petitioners did here. See Pet. App. 27a; *Barnett* v. *City of Chicago*, 141 F.3d 699, 705 (7th Cir.), cert. denied, 524 U.S. 954 (1998).

B. This Case Does Not Fit Into Either Of The Situations In Which The United States Has Stated That The General Majority-Minority Requirement May Be Relaxed

The United States has previously explained that the majority-minority requirement may be relaxed in two specific situations. See U.S. Br. at 19-20, *LULAC*, *supra* (Nos. 05-204, 05-276 & 05-439). Neither of those situations, however, is presented here. Accordingly, while the North Carolina Supreme Court properly concluded that the State was not obligated under Section 2 to draw the proposed 39% minority district at issue, it went further than necessary to decide this case by stating that a proposed district must always "satisfy the numerical majority requirement as defined herein." Pet. App. 33a.

1. The United States has explained that "the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial

discrimination has been shown." U.S. Br. at 12 n.6, *Growe*, *supra* (No. 91-1420); see *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); U.S. Br. in Opp. at 21-23, *Garza*, *supra* (No. 90-849). Where a plaintiff shows that the challenged redistricting plan was adopted with discriminatory intent, such evidence tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis. And where intentional racial discrimination is shown, relaxation of the majority-minority requirement ensures that a Section 2 claim will be available whenever such a claim is also cognizable under the Fourteenth or Fifteenth Amendment of the Constitution (each of which requires a showing of discriminatory intent). See *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997).

2. The United States has explained that the majority-minority requirement may also be relaxed where the minority group is "compact * * * and substantial in size *yet just short of a majority*." U.S. Br. at 19, *LULAC*, *supra* (Nos. 05-204, 05-276, and 05-439) (citation omitted). In *Valdespino* v. *Alamo Heights Independent School District* (No. 98-1987), for example, the minority group at issue represented 48% of the citizen voting-age population. The United States filed a brief as amicus curiae at the certiorari stage, repeatedly referring to the fact that the minority group was "just short of a majority." U.S. Br. at 11, *Valdespino*, *supra*; see *id.* at 10 (noting that the minority population was "slightly less than 50%"). In *Perez* v. *Pasadena Independent School District* (No. 98-1747), the United States filed an

amicus brief reiterating the position it took in *Valdespino*. See U.S. Br. at 7-8, *Perez, supra*.

This qualification accounts for the fact that there may be difficulties in determining the precise percentage of minority members in a proposed district's population, and statistical discrepancies could therefore make the difference in borderline cases. For example, as amici note, see, *e.g.*, Persily Br. 7-15; LWV Br. 19-28; Illinois Br. 27-29, the Census Bureau's data on citizen voting-age population rely to some extent on estimates. As a result, to the extent that the citizen voting-age population is the relevant population, there may be situations in which the figures for a proposed district are subject to sampling error (or other types of error, such as undercounting). See, *e.g.*, *Garza* v. *County of Los Angeles*, 756 F. Supp. 1298, 1322 (C.D. Cal.), aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). Where the plaintiff presents data indicating that the minority group at issue represents nearly 50% of the relevant population in a proposed district, it is thus possible that the true figure is in fact *above* 50%.

Moreover, any data on population merely represent a snapshot in time, and migration to and from a proposed district, as well as changes in citizenship rates (to the extent that citizenship status is relevant), may result in an actual minority population that is higher or lower than statistical estimates based on preexisting data suggest. In *Garza*, for example, the minority group at issue did not constitute more than 50% of the population in the first year after the 1980 census, but evidence suggested that it had grown to a majority in the following years. See U.S. Br. in Opp. at 12-13, *Garza, supra* (No. 90-849). For that reason as well, it is reasonable to conclude that the first *Gingles* precondition may be satisfied where

the data indicate that a minority group is just short of 50% of the relevant population in a proposed district.[4]

3. The proposed district at issue in this case does not fall into either category. Petitioners do not contend that House District 18 was adopted with discriminatory intent.[5] Likewise, African Americans constitute only 39.36% of the voting-age population of House District 18 (and no evidence suggests that African Americans constitute a different percentage of the *citizen* voting-age population). Pet. App. 69a. This case is therefore far removed from *Valdespino* (where the minority group represented 48% of the citizen voting-age population), or

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[4] In some of the near-50% borderline cases discussed in the text, the United States has justified relaxation of the majority-minority requirement in part on the ground that, in those cases, only a "small amount" of "crossover" voting would be necessary to ensure that the preferred candidate of voters from the minority group could be elected. U.S. Br. at 11, *Valdespino*, *supra* (No. 98-1987); see *id.* at 10-11 n.2 (observing that only "a minimal amount of crossover voting * * * would enable minority voters to elect representatives of their choice"); *id.* at 12 n.3 (referring to "a small but consistent amount of crossover voting" and stating that, "[a]t some point, of course, the amount of crossover voting" may be too substantial to support a Section 2 claim). The amount of "crossover" voting required to ensure that a candidate preferred by African Americans is elected in the proposed district at issue in this case, however, is significantly larger—almost 18% or more, see pp. 29-30 & n.10, *infra*—than in previous cases in which the United States recognized that a Section 2 claim may lie, where the minority group was "substantial in size yet *just short of a majority*." U.S. Br. at 19, *LULAC*, *supra* (Nos. 05-204, 05-276, and 05-439).

[5] Amici NAACP et al. suggest (Br. 13-15) that the whole-county provisions of the North Carolina Constitution, which prohibit the splitting of counties in legislative redistricting, themselves raise "serious concerns" under the Voting Rights Act. While a proper plaintiff would certainly be free to bring that claim, petitioners did not raise such a claim below and do not make it here.

a case where, based on a discrepancy in data or recent population changes, it is plausible to conclude that a minority group may in fact constitute more than 50% of the relevant population in the proposed district. As a result, in order to decide this case, it was not necessary for the North Carolina Supreme Court to state that a numerical majority is *always* required. See *id.* at 33a.

C. Petitioners Have Not Sustained Their Burden Of Establishing That Section 2 Required North Carolina To Draw The 39% Minority District At Issue

At a minimum, the further that a minority group in a proposed legislative district is from a numerical majority, the more difficult it is for the group to maintain a valid Section 2 claim. Petitioners, as the parties effectively raising the Section 2 claim in this case, bear the burden of persuasion on the Section 2 issue. See *Voinovich*, 507 U.S. at 155. To meet that burden in sustaining the 39% minority district here, petitioners urge this Court to adopt a "functional majority" test that goes far beyond the threshold precondition originally articulated in *Gingles*. That contention should be rejected.

1. To begin with, adopting petitioners' proposed interpretation of Section 2 would require retooling *Gingles*—if not, as petitioners' own amici suggest, relegating *Gingles* to the status of an alternative (and fallback) standard. See *LULAC*, 548 U.S. at 490 n.8 (Souter, J., concurring in part and dissenting in part) (recognizing that "[a]ll aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible ['crossover'] districts"); see also, *e.g.*, Lawyers' Committee Br. 22-28; MALDEF Br. 4. Although it is true that this Court has reserved the question presented by

petitioners, the Court should be reluctant to adopt a position that would require it to overhaul, if not effectively dismantle, the framework used by it and the federal appellate courts for more than two decades in evaluating Section 2 vote-dilution claims.[6]

2. Petitioners' "functional majority" test also is difficult to reconcile with the text of Section 2. As discussed above, see pp. 10-11, when a minority group constitutes substantially less than a majority in a proposed district, "minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the [challenged voting practice]." *Gingles*, 478 U.S. at 50 n.17. And such voters therefore cannot claim that they were denied an *equal opportunity* to elect the representative of their choice because the proposed district was not drawn. See 42 U.S.C. 1973(b).

Petitioners' interpretation of Section 2 also is at odds with the Court's admonition that the "[f]ailure to maximize [minority electoral opportunity] cannot be the measure of § 2." *De Grandy*, 512 U.S. at 1017; see *id.* at 1026 (Kennedy, J., concurring in part and concurring in the judgment). As this Court has stressed, "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates."

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[6] As several courts (and petitioners' own amici, see, *e.g.*, Lawyers' Committee Br. 13-14) have recognized, a "functional majority" test also could create tension between the first and third *Gingles* preconditions. See, *e.g.*, *Metts*, 363 F.3d at 12 ("To the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut."); *id.* at 14 (Selya, J., joined by Torruella, J., dissenting) (noting that "[a] showing of majoritarian bloc voting is structurally inconsistent with" a minority group's "reliance on a high level of crossover voting" to assert electoral control); see also U.S. Br. 12 n.3, *Valdespino*, *supra* (No. 98-1987).

Id. at 1014 n.11. In that regard, petitioners err in stating that "[t]he text of Section imposes an *opportunity-to-elect* precondition." Br. 17 (emphasis added); see, *e.g.*, Br. 28 (contending that Section 2 "asks whether a minority group, of whatever size, has been deprived of an opportunity to elect candidates of choice"). To be clear, Section 2 grants minority groups the right to an *equal* opportunity to elect, see 42 U.S.C. 1973(b), not the right simply to *maximize* electoral opportunity.

Petitioners' position is fundamentally inconsistent with that principle. Petitioners contend that Section 2 effectively requires the State to draw a district when a minority group can put together a winning coalition, even if the minority group itself is substantially less than a majority. Under petitioners' standard, a plaintiff presumably could pursue a Section 2 vote-dilution claim on behalf of a minority group whose members constituted only a fraction of the relevant population, where the plaintiff could show that the rest of the population was divided in such a way that the preferred candidate of the minority group would be unlikely to be elected (absent the proposed district). Such a standard would potentially give one group not merely an equal opportunity, but a *greater* opportunity than another group to elect the candidate of its choice.

Even petitioners appear to recognize that there must be some limit to the "functional majority" test. Thus, they suggest that a Section 2 vote-dilution claim could not proceed where the amount of "crossover" voting required to render it likely that the preferred candidate of voters from a minority group would be elected exceeds a certain numerical threshold. See Br. 16 (suggesting that a "functional majority" claim can proceed only where there is a "limited number" of "crossover" vot-

ers). Such a requirement is no more grounded in the text of Section 2 than an unqualified "functional majority" test. Moreover, it would in effect simply substitute a lower percentage for the majority-minority requirement of the first *Gingles* precondition. And ultimately —no doubt following significant litigation and uncertainty—the "crossover" line on which courts ultimately settle would be no less "unbending" (*ibid.*) than the 50% requirement of which petitioners complain.

Petitioners' amici alternatively suggest that a court could allow a Section 2 vote-dilution claim to proceed to the totality-of-the-circumstances inquiry based on satisfaction of the "functional majority" test, but reject such a claim under the totality of circumstances where the resulting number of "functional majority" districts would be disproportionate to the minority group's share of the population. See, *e.g.*, Lawyers' Committee Br. 14-15. This Court, however, has consistently held that proportionality is not a requirement of Section 2, but instead merely one of many factors to be considered in the totality-of-the circumstances inquiry. See *LULAC*, 548 U.S. at 436; *De Grandy*, 512 U.S. at 1017-1021. That approach, moreover, would likewise simply be a recipe for more, and more protracted, Section 2 litigation.

3. The constitutional concerns and potentially drastic practical consequences of petitioners' proposed interpretation of Section 2 also counsel against adopting that interpretation, particularly in the absence of any indication that Congress intended it. See, *e.g.*, *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004); *Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991).[7]

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[7] Far from establishing that Congress intended to permit vote-dilution claims under Section 2 on a "functional majority" theory, the

a. The Voting Rights Act was intended to "hasten the waning of racism in American politics," *De Grandy*, 512 U.S. at 1020, not to ensure that "race predominates in the redistricting process," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); see *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993) ("Racial classifications with respect to voting carry particular dangers."). Indeed, as this Court observed in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Id.* at 490-491; see *De Grandy*, 512 U.S. at 1029-1031 (Kennedy, J., concurring in part and concurring in the judgment). Petitioners' proposed standard runs counter to that goal.

Notwithstanding petitioners' assurances to the contrary, see, *e.g.*, Br. 37-39, their proposed "functional majority" test will inevitably magnify the consideration of race in redistricting decisions. Members of this Court have already recognized that extending Section 2 to "influence" districts would have that effect. See *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.) ("If § 2 were interpreted to protect ['influence' districts], it would

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legislative history of the 1982 amendments to the Voting Rights Act suggests that Congress was focused on voting practices that reduced the minority population in electoral districts below 50%. See, *e.g.*, S. Rep. No. 417, 97th Cong., 2d Sess. 120-121 (1982). Moreover, when it came to "interpreting the definitional parameters of districts which give blacks an opportunity to elect the candidate of their own choice," the legislative history indicates that Congress was working off a baseline rule that "a 65 percent level of minority population in a given district is * * * one which will 'give blacks an opportunity to elect a candidate of their choice.'" *Id.* at 121 n.40 (quoting testimony of Professor George C. Cochran).

unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions"). Extending Section 2 to "functional majority" districts would raise similar concerns. Indeed, under a "functional majority" standard, a redistricting record might frequently (if not typically) resemble the record in *Georgia*, where the State sought to maximize the number of districts in which minority groups, even if not a majority of the voting-age population, would control electoral races. See 539 U.S. at 470. As Justice Kennedy observed in his concurring opinion, while the issue was not before the Court, the facts of *Georgia* indicated that "race was a predominant factor in drawing the lines of Georgia's * * * redistricting map." *Id.* at 491.

This Court has interpreted the Voting Rights Act to avoid such constitutional concerns, see, *e.g.*, *Miller*, 515 U.S. at 926, and it should do so here as well. Indeed, as discussed next, the inevitable administrative difficulties and litigation that petitioners' approach invites would not only magnify the legislatures' use of race in redistricting, but enlist the courts in making predictive judgments about the role of race in the electoral process. That cannot help but reenforce "the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 928; see *Shaw*, 509 U.S. at 647-648.

b. A "functional majority" test would also generate considerable uncertainty and administrative difficulties for legislatures responsible for drawing district lines. As petitioners recognize (Br. 34), the *Gingles* preconditions focus on "the actual voting behavior of the electorate" (*e.g.*, whether the minority group is politically cohesive or whether the majority group votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate). By contrast, a "functional majority" test would

mandate a much more complicated, predictive inquiry into likely voting behavior. See *McNeil*, 851 F.2d at 944 (noting that "[m]ovement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations"). That inquiry would greatly complicate the task faced by legislatures in determining whether Section 2 requires the creation of a particular district following new census data, a new election cycle, or simply a new political trend.

For example, a legislature considering whether a proposed district is required, or a court engaging in a threshold "functional majority" inquiry, would have to determine, *inter alia*, (1) how many voters in the proposed district would be registered and turn out from each group; (2) how many voters would "cross over" to support the (hypothetical) preferred candidate of a minority group; (3) how many voters from the minority group would "cross over" in the opposite direction to support a (hypothetical) alternative candidate; (4) whether an incumbent would run for reelection in future cycles (and, if so, whether the presence of the incumbent would affect the likelihood that the preferred candidate of the minority group would be elected); and (5) whether there would be "coattail" effects in future cycles based on the results in other elections. See, *e.g.*, Pet. App. 25a; Persily Br. 15-16; Bishop Br. 13-17.[8]

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[8] In *LULAC*, Justice Souter, joined by Justice Ginsburg, suggested that the first *Gingles* precondition could be satisfied where "minority voters in a [proposed] district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election." 548 U.S. at 485-486 (opinion concurring in part and dissenting in part). But Section 2 was designed to protect minority groups, not the "dominant party" in place. See 42 U.S.C. 1973(b). In addition, leaving aside the question of how the other *Gingles* precondi-

As petitioners' own amici concede, therefore, a "functional majority" test would require "a more complicated analysis" involving "development of additional evidence that is not part of the existing § 2 calculus." Lawyers' Committee Br. 5, 7, 24-28; cf. *Georgia*, 539 U.S. at 480 ("The ability of minority voters to elect a candidate of their choice is * * * often complex in practice to determine."). Moreover, as petitioners' amici further acknowledge, "[a] functional approach is likely to be especially problematic in cases involving local elections for governing bodies"—which represent a "substantial amount of § 2 litigation"—given that relevant data for such districts will be even more difficult, if not impossible, to obtain. Lawyers' Committee Br. 24.[9]

The upshot is that, by presenting considerably greater difficulties in application, the threshold *Gingles* (or *Gingles*-like) inquiry would cease to perform any useful screening function, and legislatures would face

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tions would operate in that context, see 548 U.S. at 490, such a standard would potentially present difficulties in application similar to those of petitioners' "functional majority" standard. For example, it would require a legislature or court to predict how many voters would be registered and turn out from each group and which party voters would support in the general election—all with regard to a proposed district as to which precise actual data likely do not exist.

[9] In some cases, a legislature or court may determine that it is possible, but not certain, that the preferred candidate of minority voters would be elected on the basis of "crossover" voting. Under petitioners' apparent standard, it is unclear *how* probable the election of a preferred candidate would have to be (or how confident a legislature or court would have to be about the candidate's election) in order to satisfy the "functional majority" test. See Pet. Br. 40 (suggesting that the plaintiff must show that minority voters are "likely" to have the "opportunity" to elect candidates of their choice); Lawyers' Committee Br. 4 (suggesting that the plaintiff must show that "minority voters * * * have a realistic potential to elect candidates of their choice").

enormous uncertainty in drawing districts in compliance with Section 2. This Court has repeatedly stressed that "[e]lectoral districting is a most difficult subject for legislatures"; that "reapportionment is primarily the duty and responsibility of the State"; and that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915 (citation omitted); see *Voinovich*, 507 U.S. at 156-157; *Growe*, 507 U.S. at 34. Redistricting is already hard enough. Petitioners' proposed standard would greatly complicate the task faced by the States; eliminate a significant degree of discretion that States currently possess in deciding how to draw district lines; and, as discussed next, subject the States to protracted litigation over new plans. Given the absence of any indication that Congress intended to subject the States to such a regime, this Court should decline to interpret Section 2 in that fashion.

c. Adopting petitioners' "functional majority" test would not only transform the nature of Section 2 litigation, but increase its volume as well. As the North Carolina Supreme Court observed, under petitioners' proposed approach, "each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates," creating a "Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes." Pet. App. 24a (citation omitted). That concern is magnified by the fact that, unlike Section 5 of the Voting Rights Act, which applies only to certain covered jurisdictions, Section 2 applies nationwide.

Moreover, if a plaintiff could pursue a Section 2 claim by proposing a district with as little as a 39% minority population, then it would be difficult, if not impossible, to establish a reasoned endpoint or judicially manageable standards for evaluating vote-dilution claims by minority groups constituting less than a majority. Cf. *Holder* v. *Hall*, 512 U.S. 874, 885 (1994) (plurality opinion) (rejecting a Section 2 challenge to the size of a governing authority on the ground that such claims are "inherently standardless"); *id.* at 890 (O'Connor, J., concurring in part and concurring in the judgment) (same). The result would not only make Section 2 claims even more difficult to adjudicate, but—given the breadth and complexity of petitioner's proposed standard—trigger potentially never-ending cycles of Section 2 litigation.

4. A "functional majority" test is not, as petitioners suggest (Br. 34-36), necessary to align Section 2 with Section 5. As this Court has repeatedly emphasized, "the § 2 inquiry differs in significant respects from a § 5 inquiry." *Georgia*, 539 U.S. at 478. The basic premise of petitioners' argument is therefore fundamentally unsound. Moreover, in *Georgia*, the Court rejected the argument that Section 5 requires the States to maximize the number of majority-minority districts and, instead, held that "Section 5 leaves room for States to use * * * influence and coalitional districts" as well. *Id.* at 483. That decision is inconsistent with petitioners' position that Section 2 *required* North Carolina to draw a "crossover" district like House District 18, because such an interpretation of Section 2 would deprive the States of the "flexibility" that *Georgia* held the States retained under Section 5 "to choose one theory of effective representation over the other." *Id.* at 482.

As part of the most recent reenactment of the Voting Rights Act in 2006, Congress added new Section 5(b), which provides that, for purposes of Section 5, "[a]ny voting * * * practice * * * that * * * will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [language minority status], to elect their preferred candidates of choice denies or abridges the right to vote." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(b), 120 Stat. 580-581 (to be codified at 42 U.S.C. 1973c(b)). In adopting that provision, however, Congress did not amend Section 2 (or its equal-opportunity-to-elect standard). In addition, although it is clear that new Section 5(b) was intended to overrule *Georgia* at least in part, it is unclear whether Congress intended to preclude consideration of only "influence" districts in the Section 5 inquiry, see, *e.g.*, H.R. Rep. No. 478, 109th Cong., 2d Sess. 70-71 (2006), or "crossover" districts as well, see, *e.g.*, S. Rep. No. 295, 109th Cong., 2d Sess. 20-21 (2006).

In any event, even assuming that the amended Section 5 mandates consideration of "crossover" districts as part of the retrogression inquiry, that is not incompatible with the longstanding interpretation of Section 2 discussed above. The majority-minority requirement of the first *Gingles* precondition does not preclude consideration of "crossover" districts altogether, because it does not *require* a jurisdiction to draw a majority-minority district whenever such a district could be drawn. Instead, a jurisdiction remains free to draw a "crossover" district, provided that, under the totality of circumstances, the resulting district does not deny minority voters an equal opportunity to elect the representa-

tive of their choice. See, *e.g.*, *Uno* v. *City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995). So too, assuming that Section 5 mandates consideration of "crossover" districts as part of the retrogression inquiry, a jurisdiction would remain free to draw a "crossover" district, provided that there is no discriminatory purpose or retrogressive effect. Accordingly, there is no "disharmony" (Pet. Br. 34) between Section 2 and Section 5 that a "functional majority" test is needed to resolve.

5. As noted, this Court's refusal to adopt a "functional majority" test would not preclude state legislatures from drawing "crossover" districts, consistent with the other restraints imposed by the Voting Rights Act. Indeed, a number of legislatures did so in the wake of the 2000 census, notwithstanding the fact that no court of appeals had embraced the "functional majority" test. See, *e.g.*, Bishop Br. 4-5. Many have argued that such districts are desirable as a policy matter, because "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020; see generally *Georgia*, 539 U.S. at 480-483. Section 2, however, leaves States a measure of discretion to reach their own conclusion on such matters of political theory; it does not require States to create such districts whenever feasible.

Certainly, there have been significant gains since the Voting Rights Act was enacted in eliminating the invidious discrimination targeted by the Act. See Bishop Br. 4-5. Petitioners' amici argue that, "[o]ver time, as voters become increasingly willing to judge candidates on their merits, rather than on the color of their skin, the demands of the Voting Rights Act must evolve." LWV Br. 4. The proper forum for such evolution, however, is Congress, not the courts. As the recent amendments to

(and reauthorization of) Section 5 underscore, Congress has not hesitated to adapt the Voting Rights Act to new trends or concerns as it sees fit. The policy arguments raised by petitioners and their amici are therefore better addressed to Congress than to this Court.

D. If This Court Adopts A "Functional Majority" Standard For Section 2 Vote-Dilution Claims, It May Wish To Remand For Further Proceedings

If this Court adopts a "functional majority" test or otherwise alters the longstanding *Gingles* framework, it may wish to remand this case for further proceedings and, in particular, for consideration of two issues that the lower courts did not address.

First, it may be appropriate for the lower courts to determine whether the "crossover" required to ensure the election of the preferred candidate of minority voters in House District 18 is simply too large to permit a Section 2 vote-dilution claim challenging that district to proceed. In this case, with African Americans constituting 39.36% of the voting-age population of House District 18, almost 18% of the remaining voting-age population would have to "cross over" in a given election—and perhaps more, depending on the extent to which African American voters support other candidates.[10] "Cross-

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[10] Petitioners suggest (Br. 31) that the necessary amount of "crossover" voting is 11%. That is misleading. Because African American voters constituted 39.36% of the voting-age population in House District 18, other voters constitute 60.64% of that population. Assuming that *every* African American voter supported the candidate of choice, it is true that another 10.64% of the *total* voting-age population would have to support that candidate for the candidate to be elected. The critical fact, however, is that 17.55% of the *remaining* voting-age population (*i.e.*, 10.64% divided by 60.64%) would have to "cross over" to support the minority group's candidate of choice.

over" voting of that magnitude may exceed the appropriate threshold, even under a "functional majority" test. Cf. *Abrams* v. *Johnson*, 521 U.S. 74, 92-93 (1997).[11]

Second, it may be appropriate for the lower courts to determine whether, under the totality of circumstances, it was necessary for the General Assembly to draw House District 18 in order to avoid violating Section 2 of the Voting Rights Act. While the evidence presented below indicates that African Americans constitute 39.36% of the voting-age population in House District 18, Pet. App. 69a, it also indicates that the General Assembly could have drawn an alternative district that kept Pender County together with an African American voting-age population of 35.33%, J.A. 73. It may be possible to argue that a 4% difference in the African American voting-age population would not materially affect the likelihood that the preferred candidate of African American voters would be elected—and that, without a showing that the 4% difference is likely to be dispositive for purposes of ensuring an equal opportunity to elect, Section 2 should not be read to require North Carolina to create the district at issue.[12] Of course, the difficul-

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[11] Although respondents stipulated, with regard to the third *Gingles* precondition, that "the racial difference in the preference of voters results in the white majority voting sufficiently as a block [*sic*] to usually enable it to defeat the minority's preferred candidate," Pet. App. 130a, they made no stipulation concerning the distinct question of the extent to which white voters in House District 18 would "cross over" to support the minority group's preferred candidate (or the extent to which members of the minority group would support other candidates).

[12] In making this determination, the lower courts would need to consider petitioners' evidence that, in the wake of the 1990 census, no House district *elsewhere* in North Carolina with an African American voting-age population of less than 38.37% had a history of electing African American representatives. J.A. 40, 45. The lower courts would

ties of the foregoing inquiries simply underscore the doctrinal and practical problems raised more generally by petitioners' proposed "functional majority" rule.

CONCLUSION

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
KANNON K. SHANMUGAM
Assistant to the Solicitor General
DIANA K. FLYNN
ANGELA M. MILLER
Attorneys

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also need to consider evidence concerning how the alternative district proposed by respondents would perform. See Resp. Br. 8-9, 49-50.

AMICUS CURIAE BRIEF

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No. 07-689

IN THE

Supreme Court of the United States

GARY BARTLETT, Executive Director of the North Carolina State Board of Elections, *et al.*,

Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND THE LAWYERS DEMOCRACY FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CLARK H. BENSEN
3112 Cave Court
Lake Ridge, VA 22192
(703) 690-4066

E. MARSHALL BRADEN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Avenue
Suite 1100
Washington, D.C. 20036
(202) 861-1500

Counsel for Amici Curiae

217679

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does section 2 of the Voting Rights Act require the creation of a "crossover minority" district when to do so would be contrary to race-neutral state constitutional mandates?

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INTERESTS OF *AMICI CURIAE*

***Amicus* ALEC** – The American Legislative Exchange Council ("ALEC") is the nation's largest nonpartisan individual membership association of state legislators. ALEC has more than 2,000 members, comprising approximately one-third of all state legislators in the United States. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of legislative accountability and governmental structure. ALEC serves as a "think tank" on many specific legislative issues and provides for its members a variety of resources, including a number of publications, a website (www.alec.org), and affiliation with more than 300 corporate and private foundation members. ALEC's interest in this proceeding is the protection of state legislatures' authority over the redistricting phase of the apportionment process, thereby promoting the vital principles of federalism (ALEC represents *state* legislators) and separation of powers (ALEC represents state *legislators*) in the areas of redistricting and elections – domains traditionally entrusted to the collective judgment of the state legislatures. U.S. Const. art. 1, § 4.[1] It believes in the importance of preserving political subdivisions and other objective means of limiting unconstitutional

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

gerrymandering. ALEC also promotes the development and adoption of clear legal rules that can be plainly understood and straightforwardly applied by those responsible for the districting phase of the apportionment process for Congress and the state legislatures.

***Amicus* LDF** – The Lawyers Democracy Fund ("LDF") is a non-profit organization created to engage in activities to promote the role of ethics and legal professionalism in the electoral process. Its mission is to promote fair elections, ensure that all citizens are able to exercise their right to vote, and encourage election methods that prevent dilution of any citizen's vote.

SUMMARY OF ARGUMENT

This Court should not overrule *Thornburg v. Gingles* by eliminating the majority-minority precondition in favor of the requirement, advanced by Petitioners, that redistricting bodies must form crossover minority districts wherever there exists a minority population large enough to control a party primary and that party's candidate likely will win the general election. Petitioners have extended an invitation for the courts to enter a partisan and political thicket that this Court should decline.

The Voting Rights Act ("the Act") is a remedial statute intended to enforce the constitutional guarantees of the Fourteenth and Fifteenth Amendments. By virtually all accounts, the Act, as interpreted by this Court, has been successful in increasing the equality of opportunity for minority

citizens to elect candidates of their choice. Petitioners ask this Court to turn its back on these twenty-plus years of success and on its interpretation of section 2—an interpretation with clear guidance to political bodies assigned the difficult task of drafting representational plans.

The majority-minority precondition is rational and workable, in large part because it is consistent with this country's electoral system. A majority of votes wins an election. In order for an electoral procedure, here a representative district, to provide a minority community with less opportunity to elect its candidate of choice, the minority community must, in an alternative district, have the ability to elect—*i.e.*, must have the ability to cast the majority of votes necessary to elect its candidate of choice. This is, quite appropriately, what is demanded by the first of the *Gingles* preconditions, the majority-minority requirement.

Petitioners argue that the majority-minority precondition should be rejected on the ground that a minority community can still elect its candidate of choice even when it constitutes less than a majority of a particular district with crossover White voter support. This concept is inconsistent with the third of the *Gingles* preconditions, the existence of racially polarized voting sufficient to deny the minority community the ability to elect its candidate of choice. Crossover districts are simply another expression of traditional coalition politics. While they may be entirely appropriate as long as they are created in compliance with federal and state legal requirements, crossover minority districts are not mandated by the Voting Rights Act. The crossover

nature of these districts creates the very real risk that the result would be a decrease in the number of minority members in Congress and our state legislatures, replacing these members with candidates preferred by the non-minority crossover voters.

Instead of the clear, workable standard provided by the majority-minority requirement, Petitioners would have drafting bodies operate under an amorphous, flexible standard that potentially requires the creation of crossover districts in any and every geographical area in which a population of minority voters may be found. Under Petitioners' standard, drafting bodies must create "minority" representational districts guaranteed to elect the candidate likely to receive a majority of a minority group's votes regardless of whether the minority group alone would be sufficiently large to elect the candidate. Despite the fact that this Court has expressly rejected the notion that the Voting Rights Act requires maximization of minority voting strength, Petitioners would transform section 2 into a statutory requirement that drafting bodies maximize the influence of minority voters.

Moreover, the only way for a state legislature or city council to effectuate such a statutory requirement would be to make race the paramount consideration in virtually every districting decision. In this case, North Carolina would be compelled to ignore a state constitutional requirement to preserve county boundaries and create a crossover district guaranteed to elect a specific incumbent member. This would be a design driven not by traditionally accepted redistricting criteria such as geography and preservation of political subdivisions, but

by race and the use of race as a proxy for partisan objectives. It is impossible to reconcile Petitioners' approach with this Court's racial gerrymandering decisions. The Court has repeatedly recognized that political subdivisions serve as the single most effective barrier to gerrymandering. Casting aside state requirements such as North Carolina's "Whole County" provisions in the name of racial maximization would transform the Voting Rights Act from a shield for minority voting rights into a sword for partisan gerrymandering. This is not what Congress intended.

ARGUMENT

I. This Court Should Not Overrule *Thornburg v. Gingles* By Eliminating The Majority-Minority Precondition.

Petitioners would have this Court disregard the long-established judicial practice of *stare decisis* by overturning its decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). For over twenty years, the standard enunciated by the Court in *Gingles* has stood the test of time.[2] In *Gingles* and subsequent decisions, this Court has provided understandable guidance to those drafting representational plans across the nation, from plans for Congress to plans for local governing boards.[3] "Our

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2. *Gingles* was "the first post-amendment decision on section 2 by the Court and [is] still the leading authority." *Metts v. Murphy*, 363 F.3d 8, 10 (1st Cir. 2004).

3. "In reality, this [circuit] court has interpreted the *Gingles* factors as a bright line test." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852 (5th Cir. 1999).

legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996). There is no area where partisan controversy is greater than in the area of redistricting.

In *Gingles*, this Court enunciated a three-prong threshold test for establishing a claim of vote dilution under section 2 of the Voting Rights Act, the first of which is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. While the districting plan at issue in *Gingles* included multimember districts, the three preconditions have since been held to apply to the creation of single-member districts. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Growe v. Emison*, 507 U.S. 25, 40 (1993).

When a majority-minority representational district can be created under neutral criteria, such as compactness, and racial bloc voting by the majority community regularly frustrates the will of a politically cohesive minority community to elect its candidate of choice, section 2 may require the creation of a particular minority representational district. But the creation of such a district can only be required if all three *Gingles* preconditions are met, and then only after a review of the totality of the circumstances results in a determination that the minority community has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *Johnson v. De Grandy*, 512 U.S. 997, 1007-08 (1994).

Petitioners refer to the effective voting majority language of the courts as if it refers merely to the ability to elect. (Petrs.' Br. 17.) The principal inquiry under *Gingles*, however, is whether the minority voters, by themselves, have the potential to be a majority of the appropriate electoral base and, if so, whether the redistricting infrastructure frustrates this potential, nullifying it. *Gingles*, 478 U.S. at 51 n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.") (emphasis in original). Section 2 is not a guarantee of election victory for whatever coalition might be assembled, even if that coalition includes some minority voters.

Section 2 actuates the prohibitions of the Fifteenth Amendment by forbidding practices that result in "the denial or abridgement of the right of any citizen to vote on account of race or color." U.S. Const. amend. XV; *Voinovich*, 507 U.S. at 152. The Act is violated if members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It is not a violation simply if an alternative district plan may result in the election of more candidates who might receive a majority of the votes cast by minority voters. *See De Grandy*, 512 U.S. at 1016-17; *Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004).

The Petitioners strike at the North Carolina Supreme Court for "seizing on the literal language" of *Gingles*. (*See* Petrs.' Br. 24.) Surely state courts are

required to follow the literal language of this Court's interpretation of federal statutory requirements. What is striking is the Petitioners "seizing" on this Court having left open the "possibility" that less than a majority of minority voters may be able to prove a section 2 violation, and stating that this reservation moots the Court's explicit "majority" language. (Petrs.' Br. 25-27.)

Various *Amici* supporting Petitioners argue that there is disagreement amongst the circuit courts over the 50% requirement of the first prong of *Gingles*. (*See, e.g., Amici Curiae* Br. of League of Women Voters 11-12.) But the North Carolina Supreme Court was correct when it stated: "No circuit has agreed with defendants and affirmatively held that Section 2 can be satisfied by the creation of coalition, crossover, or influence districts." *Pender County v. Bartlett*, 649 S.E.2d 364, 372 (N.C. 2007). In reality, this observation of circuit conflict with respect to *Gingles*, to the extent that it exists, is not about the existence of a 50% majority precondition, but about how this majority status should be calculated.[4]

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4. The majority of federal circuit courts have determined that a minority group claiming a violation of section 2 must establish that the minority constitutes a "majority" of the population—be it total population, voting age population, or citizen voting age population—of the challenged district. *Pender County*, 649 S.E.2d at 372. Most circuit courts that have confronted this issue have determined that voting age population is the proper measure of "majority" for the purposes of establishing the first *Gingles* precondition. *See, e.g., Hall v. Virginia*, 385 F.3d 421, 423, 430 (4th Cir. 2004) (holding that in

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order "to establish a vote dilution claim under section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a *voting-age majority*" in the district) (emphasis added); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988) (stating that the first *Gingles* precondition requires the minority to be a "*voting age majority*" of the population in a district) (emphasis added); *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989) (noting that "[w]e are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote" in a district, and noting that "the trial court in *Gingles* recognized that 'no aggregation of less than 50% of an area's *voting age population* can possibly constitute an effective voting majority'") (emphasis added), *overruled in part on other grounds*, *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990). Some circuits have determined that citizen voting age population is the proper measure. *See, e.g.*, *Valdespino*, 168 F.3d at 850 (holding that, in order to make a successful claim under section 2, minorities "may [not] be less than 50% of the *citizen voting age population*" in a district) (emphasis added); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997) (holding that plaintiffs failed to establish a section 2 vote dilution claim because they were unable to show that they were a "majority of potential voters" when "citizenship information" was considered). Still other circuits have yet to weigh in on the specific issue of how to calculate a minority group's majority status. *See, e.g.*, *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting that the first *Gingles* precondition is only satisfied if "plaintiffs show a majority-[minority] district is feasible"), *cert. denied sub nom.*, *Colorado v. Sanchez*, 520 U.S. 1229 (1997); *Metts*, 363 F.3d at 11-12 (stating that the first *Gingles* precondition requires plaintiffs to establish that they are "a majority" in a compact district, and that "plaintiffs cannot prevail merely by showing that an alternative plan give them a greater opportunity to win the election").

The issue is not whether a particular group of minority voters needs to prove that they are a majority—that is, 50% or more of a district—but whether they need to be 50% or more of the total population, of the voting age population, or of the citizen voting age population. In *Reynolds v. Sims*, this Court provided a glimpse into the meaning for the short-hand theme of "one-person, one-vote": "the overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. 533, 579 (1964) (emphasis added). Thus, if equipopulous districting is merely a means to an end, the relevant population for any districting, let alone a section 2 claim, should be the most relevant objective population base, citizen voting age population (CVAP). While operational considerations relating to the collection, processing and availability of the CVAP information are clear impediments to its use in everyday districting, there can be no doubt that CVAP is the relevant characteristic data for a section 2 claim.[5]

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5. There can be substantial deviations from an equal distribution of persons across districts depending upon the population base used for apportionment. In Pender County alone, there is a substantial difference just between House District 16 (at 68,294 persons) and the House District 18 (at 63,772 persons). A review of the 120 districts for the North Carolina House illustrates the wide range of population deviations for alternative population bases. Based upon total population, the range of deviations is from 4.99% to +5.00%, a range of 9.99%. This translates into 1 person, 1 vote in District 14, and 1 person, 1.10 votes in District 52. Similarly unequal

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As Petitioners point out, the Act itself includes no express majority-minority threshold precondition. (Petrs.' Br. 27.) However, in our two-party "first past the post" electoral system, there is generally just such a majority threshold for any electoral victory. A majority requirement is therefore a logical precondition for stating a claim of denial of an equal opportunity to "elect representatives." If our system was the West European model of party lists or proportional representation, a

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distributions are evident when using total voting age population (TVAP) or registration (TREG). For TVAP, the range of deviations is from -15.37% to +13.03%, a range of 28.39%. This translates into 1 person, 1 vote in District 59, and 1 person, 1.33 votes in District 42. For TREG, the range of deviations is from -39.55% to +31.63%, a range of 71.18%. This translates into 1 person, 1 vote in District 82 and 1 person, 2.18 votes in District 14. North Carolina General Assembly, Interim House Redistricting Plan for NC 2002 Elections (2003 Statistics), http://www.ncleg.net/GIS/Archives/ASP/2003_proposed_plans.asp?PlanName=Interim_House_Redistricting_Plan_for_NC_2002_Elections*House (last visited July 31, 2008) (the information from this state website does not include any citizen voting age population (CVAP) numbers). *See Chen v. City of Houston*, 532 U.S. 1046, 2021 (2001) (Thomas, J., dissenting) (stating that whether "population" for purposes of apportionment means "total population" or "citizen voting age population" may "be dispositive of whether" the Equal Protection Clause has been violated); *Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (recognizing the potential substantive difference between striving for "equality of population" and "equality of voting strength" in the apportionment process, and stating that "[a]pportionment by population can result in unequally weighted votes, while assuring equality in voting power might well call for districts of unequal population.").

majority-minority threshold would be an illogical precondition, but our elections are not marked by party lists or proportional representation. In fact, proportional representation is specifically rejected by the Voting Rights Act's express statutory language. 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

As the Court reflected in *Voinovich* and amplified in *De Grandy*, "the *Gingles* factors cannot be applied mechanically, and without regard to the nature of the claim." 507 U.S. at 158; 512 U.S. at 1007. It is possible to postulate factual situations in which the majority requirement may be a problem due to unusual demographics. For example, areas with large universities or military bases raise an unusual case because the census total population base includes numerous persons unlikely or ineligible to vote in a district in that area. Reaching a majority of minority population on a census-derived population base in such cases might be impossible, and should not be determinative. This Court has left the door open in such unique and isolated circumstances for non-majority-minority section 2 claims. Absent such a circumstance, however, the majority-minority threshold is, and should remain, the key "bright line" for any entity charged with the difficult responsibility of creating district boundaries.

Retaining the precondition of an alternative majority-minority district for a section 2 claim does not eliminate the ability of a minority group to prevent the intentional division of geographically compact and cohesive minority communities where such division is

discriminatory under the Fourteenth Amendment. Nor does this majority-minority precondition to a section 2 claim require the dismantling of near majority-minority districts unless those districts violate state law. The Petitioners argue that the 50% precondition "creates disharmony between Section 2 and Section 5." (Petrs.' Br. 34-36.) In so arguing, Petitioners rely exclusively on *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which is surprising since Congress, in its recent renewal of section 5 of the Voting Rights Act, expressly stated its intent to overrule *Georgia v. Ashcroft* and return the section 5 retrogression inquiry to what it was under *Beer v. United States*, 425 U.S. 130 (1976).[6] S. Rep. No. 109-295, at 19 (2006). Any disharmony could only be with the prior section 5, and a crossover and influence district analysis that Congress has rejected.

II. Crossover Voting Is Incompatible With Racial Polarization And Bloc Voting.

The ability of a minority community to elect its candidate of choice in a district that is not a majority-minority district is not proof of a Voting Rights Act violation. Rather, it is proof of a lack of polarization and racial bloc voting. *See Voinovich*, 507 U.S. at 158. The express language of the first precondition in *Gingles*

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6. *See* H.R. Rep. No. 109-478, at 94 (2006) (pointing out that the new law partly overrules *Georgia v. Ashcroft*, 539 U.S. 461 (2003)); 152 Cong. Rec. H5143, H5163 (daily ed. July 13, 2006) (statements of Rep. Sensenbrenner and Rep. Watt) (demonstrating Representatives Sensenbrenner's and Watt's agreement that the new retrogression standard reenacts *Beer* into law).

forecloses a requirement of districts such as House District 18. *See Gingles*, 478 U.S. at 49. Furthermore, the interrelationship of the first, second, and third preconditions illustrates why the first precondition should remain applicable.

At some point, the ability of minority voters to elect a candidate of choice in a majority-White district must show a lack of racial polarization. *Voinovich* recognized that this corollary creates a conundrum for those who seek to prove a violation of section 2 at less than a majority of minority population: the very proof that a minority candidate could be elected at lower minority percentages in turn proves that the degree and impact of polarization is legally insufficient to prove vote dilution. *See* 507 U.S. at 158. This conclusion is consistent with this Court's earlier ruling in *Thornburg v. Gingles*, where the Court overturned the three-judge district panel and determined that a state legislative district in Durham County, North Carolina - a district similar to that at issue in Pender County in the instant case - was not sufficiently polarized so as to prove a section 2 violation. *See Gingles*, 478 U.S. at 77.

III. Racial Maximization In Districting Has Been Rejected By This Court.

Shorn of legal rhetoric, Petitioners argue for the proposition that a state must do whatever is possible to maximize the ability of a protected class, here African-American voters, to elect their candidates of choice. Section 2 requires an electoral process "equally open"

to all, not a process that favors one group over another.[7] 42 U.S.C. § 1973(b). Neither the language of section 2 nor this Court's jurisprudence requires the maximization of influence of any racial or ethnic group. Just as this Court has disapproved of the proposed "max Black" theory of districting, there also is no "max crossover" theory that can be condoned by the Court. *See Miller v. Johnson*, 515 U.S. 900, 924-25 (1995). As Justice Souter stated in *Johnson v. De Grandy*:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

512 U.S. at 1020.

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7. This Court emphasized in *League of United Latin American Citizens (LULAC) v. Perry*, its most recent redistricting case, that the Voting Rights Act protects the rights of individual voters, not the rights of groups. 126 S.Ct. 2594, 2620 (2006); *see Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 917 (1996); *Gonzalez v. City of Aurora*, No. 06-4175, 2008 WL 2841119, at *2 (7th Cir. July 24, 2008) (Easterbrook, J.).

Yet Petitioners would have this Court conclude that without a requirement of a crossover district, where the Black candidate is the "drafted" winner, minority voters will be denied an equal opportunity. This position is unsupportable. "Failure to maximize cannot be the measure of section 2." *Id.* at 1017. One cannot maximize African-American "influence without minimizing some other group's influence." *See Gonzalez v. City of Aurora*, No. 06-4175, 2008 WL 2841119, at *2 (7th Cir. Jan. 22, 2008) (Easterbrook, J.). A map drafted ignoring neutral criteria and valid state policy to the advantage of African-American candidates and at the expense of White or Latino candidates violates the Equal Protection Clause and section 2 "as surely as a map drawn to maximize the influence of those groups at the expense of [African-Americans]." *See id.* Petitioners' theory that section 2 must be interpreted to require maximization of the influence of the protected class is contrary to logic, contrary to this Court's jurisprudence, and contrary to the United States Constitution, and it must be rejected.

IV. Mandating Crossover Minority Districts Would Require Unconstitutional Predominantly Race-Based Districting

Petitioners' construction of section 2 is impermissible under this Court's racial gerrymandering jurisprudence and the canon of constitutional avoidance. Where a statute may be "susceptible of" more than one construction, but one construction presents a constitutional problem, the Court must reject the constitutionally problematic construction and construe the statute so as to "avoid constitutional problems." *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008) (citing

I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001)). Assuming, *arguendo*, that section 2 is "susceptible of" two possible constructions—(1) that advanced by Petitioner, that section 2 requires the formation of a minority district when a coalition of minority voters and some quantity of "crossover" voters could possibly be formed, and (2) that section 2 requires formation of a minority district only where a minority constitutes a numerical majority in the district—the Court must reject Petitioners' construction in order to avoid running afoul of the Fourteenth Amendment and this Court's Equal Protection Clause jurisprudence.

It is well-established that "race cannot be the predominant factor in redistricting." *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring); *see Vera*, 517 U.S. at 959, 976; *Miller*, 515 U.S. at 919; *Hunt v. Cromartie* (*Shaw III*), 526 U.S. 541, 547 (1999); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 642, 649 (1993). While it is permissible for state legislatures to be cognizant of race during the redistricting process, it is presumptively unconstitutional for a state legislature to consider racial objectives to the exclusion of traditional, race-neutral districting criteria—such as compactness and "respect for political subdivisions"—or to subordinate traditional, race-neutral districting criteria to racial objectives. *Vera*, 517 U.S. at 958, 976; *Shaw II*, 517 U.S. at 905-07; *Shaw I*, 509 U.S. at 646.

In short, state legislatures cannot draw district lines based solely, or even primarily, on race. Yet this is precisely what Petitioners' interpretation of section 2 would require of state legislatures across the country.

Under Petitioners' theory, the first step of redistricting would be to determine whether a district could be constructed, unrestrained by state law or constitutional provision, in which the African-American electorate could control the Democratic primary followed by the Democratic nominee winning the general election.[8] (Petrs.' Br. 31.) If such a district could be formed, Petitioners' argument goes, the African-American voters in the district have a section 2 right that must be protected by forming a crossover district. (Petrs.' Br. 31.)

Since African-American voters presently support Democratic candidates overwhelmingly, the logic of Petitioners' argument would require a heightened focus not only on the voting patterns of minority populations in the Democratic Party primary, but on the juxtaposition of census blocks in *every* neighborhood and community with a cognizable minority population. Race would become the paramount consideration in the districting process because legislators would have to

8. In addition to its inherent constitutional problems, Petitioners' approach creates a difficult question of practical application for state legislators: what level of minority electoral success does the line drawer determine is sufficient? Does section 2 require that every census block with minority voters be placed in a crossover district if the minority population can regularly or usually elect a Democratic candidate to a legislative body? Or only if the minority population is always able to elect a Democratic candidate? Petitioners do not provide an answer and, even if they did, the analysis under Petitioners' approach would nonetheless require state legislators to make difficult judgment calls based upon complex information itself subject to different interpretations. This would subject redistricting decisions to constant judicial challenge.

form crossover districts wherever there is a cognizable minority population that could elect a Democratic candidate by virtue of its control over the Democratic Party primary. "If section 2 were interpreted to protect this kind of influence . . . it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2625 (2006) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

Because Petitioners' interpretation of section 2 would require state legislatures to engage in unconstitutional conduct—namely, drawing each district line with an eye predominantly toward race—Petitioners' interpretation must be rejected in favor of an interpretation that does not present constitutional problems. As Justice Kennedy observed in his concurring opinion in *Georgia v. Ashcroft*, "[t]here is a fundamental flaw . . . in any scheme in which [a state legislature] is permitted or directed to [engage in] a course of unconstitutional conduct in order to find compliance with a statutory directive." 539 U.S. at 491. Certainly there is such a fundamental flaw in requiring state legislatures to violate the United States Constitution by giving paramount consideration to the race of voters in order to comply with Petitioners' interpretation of section 2.

Another fundamental flaw in Petitioners' interpretation of section 2 is that it allows state legislatures to use race as a proxy to accomplish partisan objectives. Using race as a proxy to obtain partisan

objectives is no less unconstitutional than the predominant use of race to obtain racial objectives. *See Vera*, 517 U.S. at 972 (concluding that the challenged district was "unexplainable in terms other than race" even though the legislature had used racial data "for multiple objectives" because the "record disclose[d] intensive and pervasive use of race . . . as a proxy to protect . . . incumbents . . . .").

As discussed, *supra*, the question under Petitioners' construction of section 2 is whether North Carolina voters in minority neighborhoods and communities are a majority of voters in the Democratic primary such that the minority voters must be placed into crossover districts. Petitioners apparently conclude that in order for a legislative district in North Carolina to "perform" for minorities who tend to vote Democrat, the district must elect a Democrat to the state legislature. The inevitable, and likely intended, consequence in this case of Petitioners' approach is that race becomes a proxy for accomplishing the partisan objective of increasing the number of Democrats in the North Carolina state legislature. Case law, together with the language and legislative history of the Voting Rights Act, leave Petitioners' interpretation of section 2 without support. If this interpretation of section 2 is endorsed, the Act's role in protecting and increasing minority participation and access would be seriously undermined.

The theory of partisan-blind racial bloc voting was expressly rejected by Justice White's and Justice O'Connor's concurring opinions in *Thornburg v.*

Gingles. 478 U.S. 30, 83 (1986) (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). The hypothetical set forth in Justice White's concurrence is particularly relevant:

> I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did . . . .[9]

Id. at 83 (White, J., concurring); *see also Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics"). Petitioners' argument, that in every area where there is a cognizable minority population section 2 requires that districts be drawn so that the minority-preferred Democrat usually wins, has also been recognized—and consistently rejected—by lower courts with the same

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9. Justice White's opinion is the controlling opinion on this issue. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). Given the Court's ruling on what constituted a cohesive voting group in *Quilter v. Voinovich*, 981 F. Supp. 1032 (N.D. Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), it is questionable whether racially polarized voting even exists in District 18.

justification.[10] The Voting Rights Act does not protect interest-group politics or guarantee electoral success to a candidate of any party on the grounds that the candidate is likely to be supported by minority voters.

Rather, the goal of the Voting Rights Act is to eliminate longstanding discrimination against minority persons in the context of voting. When renewed in 1982, it was championed in the United States Senate by Republican Bob Dole and signed by President Reagan. In 2006, sections of the Act were again renewed by a Republican-controlled Congress and signed by President Bush. No Republicans would have supported the Act had they believed that it mandates nationwide districting plans that favor Democratic candidates.[11]

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10. *See, e.g., Hall v. Virginia*, 276 F. Supp. 2d 528, 530 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004); *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Rodriguez v. Pataki*, 308 F. Supp. 3d 346, 382, 386, 403, 427 n.134 (S.D.N.Y. 2004) ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members."); *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *see also* Michael A. Carvin and Louis K. Fisher, *A Legislative Task: Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 12-27 (2005).

11. *See* 152 Cong. Rec. S7987 (daily ed. July 20, 2006) (statement of Sen. Sessions) ("We must remember that we are reauthorizing the Voting Rights Act, not creating a 'gerrymandering rights act.' The bipartisan support for this bill indicates that both Republicans and Democrats do not expect or intend it to be interpreted to advantage one party or the other.").

Petitioners' approach is one that guarantees the formation of districts that will elect candidates of one party at the expense of the other. Practically speaking, in North Carolina, this means that the Democratic Party will be favored because most minority voters currently favor Democratic over Republican legislative candidates. In the case of some minority voters, however, such as Cuban-Americans, the favored candidate could be a Republican. In either case, surely the Voting Rights Act should not be interpreted by this Court so as to transform it into a political party rights act. The purpose of the Act is to avoid discrimination against individual voters based upon race or ethnicity, not to boost the chances of electoral success for a particular political party. Justice Stevens has written:

> In my view, districting plans violate the Equal Protection Clause when they 'serve no purpose other than to favor one segment – whether racial, ethnic, religious, economic, or political – that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community.' In contrast, I do not see how a districting plan that favors a politically weak group can violate equal protection.

Miller, 515 U.S. at 932 (Stevens, J., dissenting) (quoting *Karcher v. Daggett*, 462 U.S. 725, 748, 103 S. Ct. 2653, 2668-2669 (1983) (Stevens, J., concurring) (internal citations omitted)).

The district that is the focus of this case, House District 18, does not favor a politically weak group. Rather, the district was designed to reelect a specific incumbent member. *See* J.A. 41, 43 (Alexander Aff. ¶¶ 9, 13); J.A. 69, 73-74 (Wright Aff. ¶¶ 4, 11-12). Petitioners now endeavor to use the fact that a cognizable number of minority voters reside in House District 18 to protect the district under section 2 of the Voting Rights Act. Indeed, since the district violates the North Carolina state constitution's "Whole County" provisions, N.C. Const. art. II, §§ 3(3), 5(3), the only way Petitioners can retain the district is to bring it within the purview of a federal statute like the Voting Rights Act. But the statute is the "Voting Rights Act," not the Members' Rights Act. The only group's interest being protected by ignoring political subdivision lines is that of the Democratic majority in the North Carolina state legislature.[12] The voting rights of all of Pender County citizens are served by following the mandates of the state's constitution and electing an individual on an equal basis, be that individual a Democrat, Republican, or Independent, or White, African-American, or Latino. Petitioners' interpretation of section 2 of the Voting Rights Act is impermissible under this Court's Equal Protection Clause jurisprudence, House District 18 is neither required nor protected by section 2, and Pender County should elect its North Carolina House members as provided for in the North Carolina constitution.

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12. Even though party candidates did not win a majority of the legislative votes under the current plan in either the 2004 or the 2006 elections, the Democratic Party has won a majority of seats in both elections. *See* North Carolina State Board of Elections, Election Results, http://www.sboe.state.nc.us/content.aspx?id=69 (last visited Aug. 13, 2008).

V. A State Constitutional Requirement To Preserve Political Subdivision Boundaries Provides One Of The Only Effective Limitations On The Most Common Types Of Gerrymanders – Partisan And Incumbent.

The simple issue before this Court is whether a federal statute, the Voting Rights Act, will override any race-neutral state requirement for districting—in this case, the North Carolina's constitutional provision for the preservation of its political subdivisions, state counties. Federal statutory provisions should be interpreted to avoid conflict with state laws,[13] especially those, like North Carolina's "Whole County" provisions, that are supported by sound public policy.

Preservation of political subdivisions is undoubtedly one of the most effective means of deterring gerrymandering. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 322 (1973) (stating that it is legitimate for states to "desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering . . . ."); *Shaw I*, 509 U.S. at 647 (emphasizing the importance of "objective factors," such as "compactness, contiguity, and respect for political subdivisions," because such factors may show that a state has not engaged in racial

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13. *See Digital Equip. Co. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (noting the "familiar principle of statutory construction that, when possible, courts should construe statutes . . . to foster harmony with other statutory and constitutional law") (internal citations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

gerrymandering).[14] More than forty years ago, this Court recognized that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds*, 377 U.S. at 578-79.

Gerrymandering is "a pathology of democracy."[15] This Court has repeatedly been petitioned, but has declined, to address the problems of the political gerrymander,[16] largely because serious questions remain on how any court could fashion a "manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution . . . ." *LULAC*, 126 S. Ct. at 548. But no matter what one's view is of the justiciability of partisan gerrymandering, surely this Court should not truncate one of the few effective barriers to the practice.[17]

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14. Robert G. Dixon, *Democratic Representation* 457 (Oxford Univ. Press 1968) ("... requiring abandonment of many district lines based on traditional political subdivision boundaries [] enhances opportunity for gerrymandering.").

15. Martin Shapiro, *Gerrymandering Fairness in the Supreme Court*, 33 UCLA L. Rev. 227, 239 (1985).

16. *Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Badham v. Eu*, 488 U.S. 1024 (1989), *aff'g* 694 F. Supp. 664 (N.D. Cal. 1988); *LULAC*, 126 S. Ct. 2594 (2006).

17. *See* Gordon E. Baker, *Unfinished Reapportionment Revolution, in* Political Gerrymandering and the Courts 24 (Bernard Grofman ed., 1990).

The term "district" encompasses explicit views of the Founding Fathers and early legislators that effective representation can best be accomplished by dividing a state into geographic units encompassing relatively recognizable regions. Such "districts" give effect to political subdivisions, allow representatives to gain "intimate familiarity" with local interests necessary to represent communities of interest, and are "convenient" for constituents.[18] In contrast, the tortured and sprawling amalgamations of census geography that appear in some district plans largely fail to follow any political boundaries or evince any geographical reasoning, preventing representatives from becoming intimately familiar with issues important to their constituents. Such meandering districts often require the representative to represent communities of diverse interests, are inconvenient for voters, and make it far more difficult for candidates and members to become familiar with the issues. Thus, requirements that preserve political subdivisions serve independent values, including facilitation of political organization, electoral campaigning, and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring); *see also Prosser v. Election Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court *per curiam*).

Members of a State House cannot easily represent their constituents, nor can voters for a district exercise the franchise intelligently, when a district is nothing more

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18. James Madison, *The Federalist, No. 56* (Hallowell ed., 1842).

than a fragmented unit divorced from, and indeed possibly in conflict with, the various other political communities established by the state. Members of the legislature are less likely to be visible and identifiable to their constituents if legislative boundaries are completely independent of other traditional geographic or political boundaries. The simple inability of the elector to understand who their elective representative is or which citizens their member represents can contribute to increasing voter apathy. Districts should present manageable and understandable constituencies for legislators to seek electoral support and effectively represent those who elected them.

Legislators are elected to "represent people" and "not trees or acres," *Reynolds*, 377 U.S. at 562, but people participate in our political process through group action.[19] Legislators represent not only individuals, but also the interests of organized and unorganized associations of individuals. If members of a legislature become uncoupled from specific political subdivisions, their bonds to identifiable interests are lessened. Legislative members cast free of the responsibility for specific communities of interest become more vulnerable to the influence of special, or single, interest groups. Petitioners' approach would make one of the most divisive of issues in American society, race and ethnicity, become the predominant factor in the creation of North Carolina's House districts. One simple definition of gerrymandering is "districting by political faith or race,

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19. Jay Hamilton & James Madison, *The Federalist, No. 55* (NY Modern Library 1937) ("Factions are . . . sown in the nature of man.").

not geography."[20] This would be the end product of the Petitioners' arguments to this Court.

VI. Two Decades Of *Gingles* Jurisprudence Indicate That It Works.

It is Petitioners' so-called flexible approach that has the potential to do the utmost damage to the interests of minority voters. For two decades, this Court's *Gingles* jurisprudence, including the majority-minority requirement, has effectively protected the rights of minority voters under section 2 of the Voting Rights Act and increased minority representation while at the same time providing understandable guidance to those drafting plans. Petitioners' approach, on the other hand, injects an untold number of uncertainties into the analysis drafting parties must perform, thus failing to provide essential understandable guidance. Petitioners' overly flexible approach also has the potential to do significant damage to the interests of minority voters. By requiring a 50% majority for the first prong of the *Gingles* test, most minority voters are assured the ability to elect a candidate of their choice, not the candidate forced upon them by a coalition of voters aside from themselves: preferred candidates are not necessarily candidates of choice. As Justice Kennedy stated recently in the Texas congressional case:

> There is no doubt African-Americans preferred Frost [a white Democrat congressman] to the

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20. Robert C. Brooks, *Political Parties and Electoral Problems* 437 (Harper Brothers 1923); *see* William Safire, *Safire's Political Dictionary* 255 (Random House 1978) (defining gerrymander as the "drawing of political lines by the party in power so as to perpetuate its power . . . .")

> Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

LULAC, 126 S. Ct. at 2625. The key to the increase in the voices of African-Americans being heard in Congress and our state legislatures has been the creation of majority-minority districts.

Before the passage of the Voting Rights Act, there were fewer than a hundred Black elected officials in the entire eleven states of the old Confederacy.[21] Throughout the 1970s and 1980s, only about one percent of majority White districts in the South elected a Black to a state legislature. Blacks who were elected were overwhelmingly from majority Black districts.[22] As late as 1988, no Black had been elected from a majority White district in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina. The number of African-

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21. U.S. Comm'n on Civil Rights, *Political Participation* 15 (1968).

22. Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* Quiet Revolution in the South 336-37 (C. Davidson & B. Grofman eds., 1994).

Americans elected to state legislatures increased after the 1990 redistricting, but again the gain resulted from an increase in the number of majority Black districts.[23] The most comprehensive and systematic study to date of the impact of the Voting Rights Act from 1965 to 1990, *Quiet Revolution in the South*, concluded that "the increase in the number of Black elected officials is a product of the increase in the number of majority-Black districts and not of Blacks winning in majority-white districts."[24] It is only the creation of such majority-minority districts under the Voting Rights Act that has succeeded in blunting the effects of systematic White bloc voting.

VII. Districting Unmoored To A Majority-Minority Population Threshold For A Section 2 Claim Opens A Pandora's Box Of New Litigation.

The Petitioners' argument that "[t]he 50% rule threatens the ultimate goal of the Voting Rights Act of minimizing the role of race in politics" is simply false. (Petrs.' Br. 37.) Anyone with even a cursory understanding of the actual redistricting process knows that the exact opposite is true. If this Court eviscerates the *Gingles* majority precondition, every legislative body drafting representational districts will be compelled to consider race in many more line-drawing/districting decisions. Race will move to the front of the process,

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23. David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 46 (Joint Center for Political and Economic Studies, 1995).

24. Handley & Grofman, *supra* note 22, at 335.

displacing traditional redistricting criteria and state requirements, and become the predominant concern in most jurisdictions.

Petitioners argue for a more flexible[25] approach to determining the "effective" number of minority voters for statutorily required districts. (Petrs.'Br. 34.) It is precisely this flexible, case-by-case approach that would be noxious for all drafters, be they state legislatures, commissioners, county supervisors, or local town and city councils. As this Court is keenly aware, litigation surrounding representational plans is already frequent and costly. If jurisdictions have to draw districts with a flexible approach rather than a "bright line" standard of 50%, they will be subject to more litigation to defend plans. The practical ramifications of overturning *Gingles* are many and have been ignored by the Petitioners.

With such a mutable threshold, resources for the line-drawing process would have to be multiplied in most jurisdictions. The political scientists who are now the key witnesses in all Voting Rights Act litigation would have to become employees of state legislatures and city councils before these bodies begin drawing any districts. Political scientists will be required to analyze election results for racial cohesiveness and racial bloc voting. And if political subdivisions are immaterial, what geographic area will require this analysis is ill-defined. Each possible district in proposed plans with any level

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25. Synonyms: adaptable, adjustable, alterable, changeable, elastic, fluid, malleable, modifiable, variable. (www.m-w.com)

of minority population will need to be analyzed for bloc voting, race cohesion, and partisan trends.

Petitioners argue not for more flexibility for state legislatures but less. Petitioners require the creation of "near" majority-minority districts wherever they can be created. Actual flexibility is the North Carolina state legislature deciding whether such districts are appropriate for North Carolina under the state constitution. Just what is near enough to a majority and how many White voters will regularly support "any" minority candidate or a particular minority candidate is unclear and will be endlessly disputed. A totality of the circumstances approach would be required for many more districts and line drawers would no longer focus solely on the areas in which a majority-minority district may exist. This is not flexibility for a state legislature but confusion.

CONCLUSION

Under the paradigm created by two decades of application of the three *Gingles* preconditions, line-drafters have learned to function with the majority-minority requirement.[26] It has been instrumental in

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26. The increase in black representatives to House District 18 was a direct result of the creation of majority-minority districts under the Voting Rights Act. Pender County was not part of the majority-minority district in the 1990s redistricting scheme. The Justice Department's objection to North Carolina's 1991 redistricting plan for its failure to create a majority-minority district in the southeastern part of the state referred to section 5 counties and not to Pender County, which is not covered by section 5 of the Act.

showing line drafters a path for recognizing the interests of minority voters while still completing the difficult task of creating new boundaries, peacefully transitioning political power.

Using Petitioners' flexible approach would substantially alter this process. Under the *Gingles* thresholds, drafting entities already review racial and ethnic demographic factors, results from previous general elections, and other information relating to other communities of interest. Under Petitioners' proposed approach, these entities would be required to collect and analyze even more information, including the results of partisan primaries, the race or ethnicity of every candidate,[27] and the degree to which polarized voting is evident.

Collecting and processing this information is not a trivial task. Moreover, this Court need go no further than the brief offered by the political scientists (*see Amici Curiae* Br. of Nathaniel Persily, *et al.*) to understand both the complexity of the data development and the degree to which subjective factors are at the core of such efforts. These types of analytics have been addressed by the courts in prior litigation, but to inculcate this type of analysis into the districting phase of apportionment for every districted representational body would make the process many times more difficult and costly. The numerous competing interests brought to the fore during districting make it a complex process

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27. This is amongst the more difficult items to collect after the fact as there is no requirement for this on candidacy forms and only a few states even track this on registration lists.

without changing federal statutory standards. Clarity is essential to providing for fair representation not subject to adjustable standards that are easily influenced by partisan objectives.

The majority-minority precondition effectively provides a bright line that, although not a "safe harbor" for state legislatures, provides a workable "line in the sand," alerting the line-drawing body to areas with potential issues that require attention and care in order to ensure equal electoral opportunity for minority citizens. Petitioners' position does away with this workable bright line in favor of a nebulous standard that will significantly increase the role of courts in redistricting. An increased role for courts cannot be reconciled with the fact that redistricting is and should remain primarily the responsibility of the political branch of each state. Petitioners' position will also lead to impermissible results: race will trump valid, sound state policies, and partisan gerrymandering will be masqueraded as compliance with the Voting Rights Act. The decision of the North Carolina Supreme Court should be upheld.

Respectfully submitted,

CLARK H. BENSEN
3112 Cave Court
Lake Ridge, VA 22192
(703) 690-4066

E. MARSHALL BRADEN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Avenue
Suite 1100
Washington, D.C. 20036
(202) 861-1500

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

GARY BARTLETT, *et al.*,
Petitioners,
v.
DWIGHT STRICKLAND, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF *AMICI CURIAE*, SANFORD D. BISHOP JR., CORRINE BROWN, G.K. BUTTERFIELD, ANDRE CARSON, DONNA M. CHRISTENSEN, YVETTE D. CLARKE, WILLIAM LACY CLAY JR., EMANUEL CLEAVER, JAMES E. CLYBURN, JOHN CONYERS JR., ELIJAH E. CUMMINGS, ARTUR DAVIS, DANNY K. DAVIS, KEITH ELLISON, CHAKA FATTAH, AL GREEN, ALCEE L. HASTINGS, JESSE L. JACKSON JR., SHEILA JACKSON LEE, WILLIAM J. JEFFERSON, EDDIE BERNICE JOHNSON, HENRY JOHNSON, STEPHANIE TUBBS JONES, CAROLYN CHEEKS KILPATRICK, BARBARA LEE, JOHN LEWIS, KENDRICK MEEK, GREGORY W. MEEKS, GWEN MOORE, ELEANOR HOLMES NORTON, DONALD M. PAYNE, CHARLES B. RANGEL, LAURA RICHARDSON, BOBBY L. RUSH, DAVID SCOTT, ROBERT C. SCOTT, BENNIE G. THOMPSON, EDOLPHUS TOWNS, MAXINE WATERS, DIANE E. WATSON, AND MELVIN L. WATT, IN SUPPORT OF PETITIONERS

Jeh Charles Johnson
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are all African American members of the U.S. House of Representatives, who are also members of the Congressional Black Caucus ("CBC").[2] Of these forty-two CBC members, twenty (or 48%) were elected to the 110th Congress from congressional districts in which African Americans constitute less than 50% of the voting-age population, based on the most recent 2000 census data. Appendix F. The African American communities in these twenty districts were able to elect their preferred candidates to the 110th Congress, despite constituting a numerical minority in the district, because of support from white

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[1] A letter of consent by the parties to the filing of this brief has been lodged with the Clerk of Court pursuant to Rule of the Supreme Court of the United States 37.3. In accordance with Rule of the Supreme Court of the United States 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Among the forty-two counted here is Representative Albert Wynn (D-MD), who resigned from Congress on May 31, 2008. *See* 154 CONG. REC. H2495 (daily ed. Apr. 22, 2008) (letter from Rep. Wynn). The Democrat running to succeed Wynn in the special election on June 17, Donna Edwards, is also African American. *See* Rosalind S. Helderman, *Wynn Wraps Up Tenure in House*, WASH. POST, May 31, 2008, at B2.

voters who crossed-over to vote with the African American community – so called "cross-over" districts – or because of support from non-African American minorities – so-called "coalition" districts.

The issue in this case is whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. A finding that the minority group must constitute 50% or more of the proposed district's voting-age population in order to seek Section 2's protections would render all existing cross-over and coalition U.S. congressional districts vulnerable to dissolution.[3] This would directly affect the twenty House CBC members elected to the 110th Congress from cross-over and coalition districts.[4] Appendix F. Such a finding would also affect CBC members who currently represent

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[3] The exception would be districts covered by Section 5 of the Voting Rights Act. Section 5 requires jurisdictions with a history of racially discriminatory voting practices to preclear redistricting plans with the Department of Justice so as to avoid retrogression in minority enfranchisement. *See* 42 U.S.C. § 1973c.

[4] If, instead of considering *voting-age* population, there were to be a finding that the minority group must constitute 50% or more of the proposed districts' *total* population, then seventeen, rather than twenty, congressional districts would be affected. Appendix F.

majority-minority districts, but whose districts, following the 2010 census or future redistricting, would be shown to have dipped below the 50% baseline.

The withdrawal of Section 2 protections for cross-over and coalition congressional districts would be detrimental to CBC members and the millions of African Americans and other minorities who are presently able to elect their preferred candidates while residing in such districts. The number of African Americans in the Congress (both House and Senate) this term is at an all-time high of forty-three. Appendix B. However, this number is still only 8% of the entire Congress, while African Americans represent 12.3% of the U.S. population.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act prohibits a districting plan that gives minority voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A bright-line, inflexible, one-size-fits-all requirement that a racial minority group must constitute 50% of a proposed district in order for Section 2 to apply is based on an unfounded assumption that only majority-minority districts merit vote dilution protection. Such a 50% rule would overlook the

emergence of cross-over or coalition districts in this country. While the population of African Americans in such districts may not reach a magic threshold of 50%, today's reality is that they often can and do push the election of their preferred candidates to Congress and state and local legislatures. In such districts, African Americans are no less in need of the vote dilution protections of Section 2 than are African Americans in districts where they happen to constitute 50% or more of the population. Indeed, an African American community's ability to put forward a preferred candidate with cross-over or coalition appeal is no less a reflection of that community's "opportunity. . . to elect" its preferred candidate than is the existence of a 50% African American voting majority.

Today's Congressional Black Caucus demonstrates this reality. For much of the 20th century, only two congressional districts in this country elected African Americans to Congress – Chicago's heavily African American and segregated south side and Harlem in New York City. Today, there are forty-two African Americans in the House of Representatives. Appendix A. Of those forty-two, twenty were elected to the 110th Congress from congressional districts that have a voting-age population that is *less than* 50% African American. Appendix F. Like North Carolina's District 18 at issue in this case, many of these congressional districts have a functionally significant

percentage of African Americans and include a limited number of whites willing to cross-over to support the African American-preferred candidate. *Id.* In addition, in some districts a number of racial minorities constitute, together, a numerical majority of the population, and in many such districts, African American voters are politically cohesive with other non-white voters and are collectively able to elect African American-preferred candidates. The Voting Rights Act has helped contribute to the rise in such coalition or cross-over districts, but the imposition of any 50% rule would likely reverse these trends.

The law should protect, not penalize, these harbingers of progress toward race-neutral voting patterns.

Also, this progress is fragile, and the current election of many African Americans to Congress from cross-over and coalition districts should *not* suggest that the protections of Section 2 are unnecessary in such districts. Rather, the *reelection* of CBC members to the 110th Congress demonstrates that, once given the "opportunity . . . to elect" their preferred candidate, African Americans choose effective lawmakers that other groups come to support as well. In addition, current CBC members, like all current members of Congress, enjoy the benefit of incumbency. This benefit does not attach to a non-incumbent minority seeking to compete in a cross-over or coalition district. Non-

incumbents may well be elected from such districts in some parts of the country, but non-incumbents simply cannot count on the accrued good will that incumbents earn.

Finally, echoing petitioners, we note that nothing in the language or structure of the Voting Rights Act itself mandates a 50% rule. *See* Br. for the Petitioners at 22. To the contrary, the Voting Rights Act references the "opportunity . . . to elect" and the "totality of the circumstances" as a basis for determining whether vote dilution has occurred under Section 2; there is no mention of a bright-line numeric standard. *See* 42 U.S.C. § 1973(b). Nor is there anything in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), that requires a 50% rule. If anything, the law rejects such inflexible numerical standards in the complex task of enforcing civil and constitutional rights.

ARGUMENT

I.

THE ADOPTION OF A FLAT 50% RULE WOULD FREEZE AND EVEN REVERSE PROGRESS THAT HAS BEEN MADE IN VOTING RIGHTS IN THIS COUNTRY

A. CBC membership reflects progress in the election of African Americans from congressional districts that are less than 50% African American.

Today's CBC reflects the nation's great progress in promoting the ability of African Americans to elect their preferred candidates and the corresponding willingness of voters of other racial groups to elect these preferred candidates to Congress.

The first African Americans were elected to Congress during Reconstruction, following the passage of the Fourteenth and Fifteenth Amendments. Appendix A. With the end of Reconstruction, the few African Americans who had been elected to Congress disappeared. *Id.* Then, between 1901 and 1929, there were no African Americans serving in Congress at all. *Id.* In the years 1929 to 1944, only one African American served in Congress, elected from Chicago's segregated and heavily African American south-side:

Republican Oscar De Priest (1929–1935), Democrat Arthur Mitchell (1935–1943), and then Democrat William Dawson (1943–1970), in succession. *Id.* In 1944, a second African American, Adam Clayton Powell, Jr., was elected to represent Harlem in New York City. *Id.* Thus, by the close of World War II in 1945, there were only two African Americans in Congress. This remained the case all the way through 1954, when the Supreme Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Appendix A. By 1958, at the early stages of the civil rights movement, there were only four African Americans in Congress. *Id.*

With the passage of the Voting Rights Act in 1965, African Americans were enfranchised in increasing numbers. By 1971, when the CBC was founded, there were thirteen African Americans in the House. *Id.* By the 1980s, the number had climbed into the twenties. *Id.*

Throughout the 1970s and 1980s, in order for African Americans and other minority voters to have a realistic opportunity to elect their preferred candidate in jurisdictions with extreme racial polarization, the minority's representation often needed to comprise 65% of the population. *See United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 164 (1977) ("We think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite

population majority – in the vicinity of 65% – would be required to achieve a nonwhite majority of eligible voters."); *Latino Political Action Comm.* v. *Boston*, 784 F.2d 409, 414 (1st Cir. 1986); *Ketchum* v. *Byrne*, 740 F.2d 1398 at 1415 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *see also* Luke P. McLoughlin, Note, Gingles *in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 324 (2005).

The 1992 elections raised the number of African Americans elected to Congress to forty,[5] including the first members since Reconstruction from Alabama, Florida, and North Carolina. Appendices A, B. Moreover, by 1992 over three-quarters of African American House members were elected from districts in which African Americans constituted *less than* 65% of the population. *See* THE ALMANAC OF AMERICAN POLITICS (Michael Barone & Grant Ujifusa eds. 1994); Appendix A. In fact, in 1992, eight of thirty-nine (20.5%) African American members of the House were elected from districts where less than 50% of the population was African American. Appendix C; *cf.* Bernard Grofman *et al., Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1397–98

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[5] This figure includes not just members of the House but also Senator Carol Moseley Braun (D-IL). Appendix A.

(2001) (noting that, during 1990s, African American candidates for U.S. House in Florida, Georgia, North Carolina, Texas, and Virginia prevailed in districts that were not majority African American); J. Morgan Kousser, *Beyond* Gingles: *Influence Districts & the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 566–68 (1993) (concluding that in 1990, African Americans and Hispanics elected to state and national office from California were all elected from districts that were not majority-minority, with all four African Americans elected from Congressional districts with African American populations less than 34%); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965 – 1990, at 301, 338 (Chandler Davidson & Bernard Grofman eds. 1994).

In the late 1990s, court-ordered redistricting across the South diminished the number of minority voters in many of what had formerly been majority-minority districts. For example, in Florida's 3rd district, the Georgia 2nd and 11th, the Louisiana 4th, the North Carolina 1st and 12th, and the Texas 18th and 30th, African American population was diminished to under 50%. *See* Grofman *et al.*, at 1397–98 nn.48 & 49. Nevertheless, African Americans continued to elect

their preferred candidates from those districts. *See* Charles E. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1222–25, 1243 (1999) ("Across the two most recent elections [1996 and 1998], thirteen Southern black candidates have won election in districts after the black percentage had been reduced such that whites constituted a majority of the registered voters.").

Today, there are forty-two African Americans in the House. Appendices A, B. When *first* elected, twenty-nine of these forty-two members came from districts that were majority-minority. Appendix E; *see also* Appendix D. Today, *no* African American represents a congressional district whose voting-age population is more than 65% African American. Appendix F. And, today, in twenty of these forty-two districts, African Americans constitute less than 50% of the voting-age population. Appendix F; *see also* Appendix C (same calculation using total population, rather than voting-age population).

The plain reality is that an increasing number of congressional districts that elect African Americans are minority-African American. Appendices C, D. This success is due to the limited but significant number of white cross-over voters and other non-African Americans now willing to support an African American candidate. But, with some notable exceptions, to elect

an African American to Congress, the percentage of African Americans in these cross-over or coalition districts must be functionally significant. *See* Grofman *et al.*, at 1392. The percentage that is functionally significant is heavily dependent on local history and conditions, including the past performance of the relevant African American community in electing its preferred candidate. In this particular case, the North Carolina Supreme Court found that "[p]ast election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.45 percent, or an African-American voting-age population of at least 38.37 percent, creates an opportunity to elect African-American candidates." *Pender County* v. *Bartlett*, 649 S.E.2d 364, 367 (N.C. 2007).

In sum, in cross-over or coalition legislative districts where African Americans do not constitute 50% of the population, those communities can and do push the election of their preferred candidates to Congress, state, and local legislatures. In such districts, African Americans are no less in need of the vote dilution protections of Section 2 than are African Americans in districts where they happen to constitute 50% of the population. A minority community's ability to put forward a preferred candidate with cross-over or coalition appeal is no less a reflection of that

community's "opportunity . . . to elect" than is the existence of a 50% majority.

B. CBC members' reelections in cross-over or coalition districts do not mean that Section 2 protections are outdated.

The discernible progress toward cross-over and coalition voting in this country is fragile. The ability of many current CBC members to be reelected from cross-over or coalition districts should *not* suggest that the protections of Section 2 are no longer necessary in those districts – many of which were previously majority-minority districts. Appendices C, D, E.

Rather, the reelection of current CBC members demonstrates that, once given the "opportunity . . . to elect" their preferred candidate, African Americans choose effective lawmakers that other groups come to support as well. In addition, one reason for the CBC members' success in cross-over and coalition districts is the benefit of incumbency – a benefit that does not attach to a non-incumbent minority seeking election in a cross-over or coalition district.

The CBC includes quite a number of veteran legislators. At present, only five are freshman; in fact, over half of the forty-two House CBC members have served in the House for more than a decade. Appendix A.

Incumbents of all races and both political parties running for reelection enjoy an advantage over those seeking their first term in Congress. Overall, members of the U.S. House win reelection 96% of the time. *See* John H. Aldrich, U.S. Dep't of State, *Congressional Elections*, http://info.state.gov/products/pubs/election04/congress.html (last visited June 2, 2008). Political scientists calculate the value of this "incumbency advantage" using varied formulas, but agree that some numerical advantage is conferred. *See, e.g.*, Steven D. Levitt & Catherine D. Wolfram, *Decomposing the Sources of Incumbency Advantage in the U.S. House*, 22 LEGIS. STUD. Q. 45 – 60, 46, 49 (1997).

To be sure, incumbents must earn this "incumbency advantage" through their performance in office. *See* Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942 – 2000*, 1 ELECTION L. J. 315-38, 315 (2002); *see also* Gary W. Cox & Jonathan Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478, 479 (1996). One dramatic example of this is Congressman Charles Rangel (D-NY), who was first elected to Congress in 1970. Appendix A. At the time, Congressman Rangel's Harlem-based district was 59% African American and 17% Hispanic. Appendix E; THE ALMANAC OF AMERICAN POLITICS 694 (Michael Barone,

Grant Ujifusa & Douglas Mathews, eds. 1972). By 2006, when Rangel was last reelected, the demographics of his district, for a variety of reasons, had nearly reversed: today his district is 30.5% African American and 47.9% Hispanic. Appendices E, F; THE ALMANAC OF AMERICAN POLITICS 1169 (Michael Barone & Grant Ujifusa, eds. 2008). Nevertheless, in 2006 Rangel won reelection with 94% of the vote. *Id.* at 1169. Meanwhile, in the 38 years since Rangel was first elected, he has become one of the most powerful members of Congress and is a well-known and influential institution in New York politics.

Congressman Melvin Watt (D-NC) is another case in point. Congressman Watt was first elected in 1992. At the time, his district was 57% African American. Appendix E. By 1998, after multiple rounds of redistricting, Watt's district was 36% African American. *See* THE ALMANAC OF AMERICAN POLITICS 1226 (Michael Barone & Grant Ujifusa, eds. 2000). Despite this dramatic shift in African American population, Watt continues to be reelected with margins that exceed 55% of the vote. *See* THE ALMANAC OF AMERICAN POLITICS 1247 (Michael Barone & Grant Ujifusa, eds. 2008). Were a non-incumbent African American to run in Watt's district today, that candidate could by no means assume similar success in this cross-over district.

Just like Congressman Watt's 12th District in North Carolina and many other Southern congressional districts, the North Carolina state house district at issue in this case was created as a majority-minority jurisdiction in the early 1990s. *See* App. 61a (*Pender County* v. *Barttlett*, Wake County Superior Ct., 04 CVS 0696 (Dec. 2, 2005) (describing 1992 Plan in which N.C. House District 98, which included an area of Pender County that is now in District 18, with total African American population of 59.26% and African American voting-age population of 55.72%)). Like Congressional District 12, this state house district has undergone court-ordered redistricting that has greatly diminished the percentage of voting-age African Americans in the jurisdiction (in this case to only 39.36%). *Id.* at 69a. During that entire time, the district continued to elect the same minority-preferred representative. *Id.* This trend is a microcosm of what has occurred across the South. *See* Bullock & Dunn, at 1222–25, 1243 (reciting examples of a number of Southern congressional districts).

An African American non-incumbent may well be elected even if African Americans do not form a majority of the population in the jurisdiction,[6] but such

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[6] For example, when current CBC members Al Green, Barbara Lee, Gwen Moore, and David Scott were first elected from the districts that they continue to represent today, the African American communities in those districts did not constitute a

a candidate cannot count on receiving the same level of cross-over or coalition support as might an incumbent. *See* Bullock & Dunn, at 1242–46. For example, from 1992 to 1998, African American incumbent members of South Carolina's House of Representatives won 34% of the white vote, while non-incumbent African American candidates only received 16%. *See* Grofman *et al.*, at 1420.

In sum, incumbent African American members of Congress have the benefit of their incumbency to build a cross-over voting coalition in previously majority-African American districts; non-incumbent African Americans running in a coalition or cross-over district do not necessarily have the same advantage. Thus, it would be a grave error to rely solely on the electoral success of the CBC members in these districts as evidence to support a national bright line rule that denies Section 2 protections to all coalition and cross-over districts.

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numerical majority of the population. Appendix E. Nevertheless, those African American communities were able to elect their preferred candidate.

II.

NOTHING IN THE VOTING RIGHTS ACT OR IN THE COURT'S VOTING RIGHTS JURISPRUDENCE REQUIRES A 50% THRESHOLD FOR SECTION 2 CLAIMS

Not only is a 50% rule based on unfounded assumptions, it also has no basis in the Voting Rights Act or in this Court's interpretation of that statute.

As petitioners note, nothing in the wording of the Voting Rights Act itself mandates the mechanical, rigid 50% rule proposed here. In *Voinovich* v. *Quilter*, 507 U.S. 146 (1993), this Court stated that Section 2 "says nothing about majority-minority districts." *Id.* at 155. To the contrary, the text of the Voting Rights Act simply references the "opportunity . . . to elect" and the "totality of the circumstances" as a basis for determining whether vote dilution has occurred under Section 2. *See* 42 U.S.C. § 1973(b); *see also* Br. for the Petitioners, at 27–28.

Further, in interpreting Section 2, this Court has repeatedly assumed, without deciding, that there *is no* requirement for a minority to constitute 50% of the population, so long as the minority group is demonstrably able to elect its own candidate with the support of other minorities or of whites. *See* Br. for the Petitioners, at 24–25; *Johnson* v. *DeGrandy*, 512 U.S.

997, 1008–09 (1994); *Voinovich*, 507 U.S. at 154; *Growe* v. *Emison*, 507 U.S. 25, 41 n.5 (1993); *Gingles*, 478 U.S. at 46 n.12; *id.* at 90 n.1 (O'Connor J., concurring) (expressly endorsing application of Section 2 to districts in which minority populations that do not constitute a numerical majority of the population still succeed in electing their preferred candidate). Recently, the Court noted: "As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less that 50% of the population." *League of United Latin American Citizens et al.* v. *Perry*, 126 S. Ct. 2594, 2624 (2006) (citing *DeGrandy*, 512 U.S. at 1009; *Voinovich*, 507 U.S. at 154; *Gingles*, 478 U.S. at 46 n.12) (Kennedy, J., plurality).

The state and federal courts are split on this question. Some courts have concluded that the 50% rule is the threshold for a Section 2 claim.[7] Meanwhile, a number of state and federal courts have

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[7] *Hall* v. *Virginia*, 385 F.3d 421, 429–31 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 725 (2005); *Valdespino* v. *Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852–53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Cousin* v. *Sundquist*, 145 F.3d 818, 828–29 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

acknowledged the possibility that the 50% rule is unnecessary for invoking the protection of Section 2.[8]

The U.S. Department of Justice has also taken the position that a "flat 50% rule" is *not* required by Section 2. *See, e.g.*, Brief for United States as *Amicus Curiae*, *Valdespino* v. *Alamo Heights Ind. Sch. Dist.*, 538 U.S. 114 (1999) (No. 98-1987), 1999 WL 33640750, at *6.

> In our view, the flat 50% rule . . . is inappropriate, for a variety of circumstances may give a minority voting population that is compact, politically cohesive, and substantial in size, yet just short of a majority the

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[8] *See, e.g.*, *McNeil* v. *Legislative Apportionment Comm'n*, 828 A.2d 840, 853, 857 (N.J. 2003); *Dillard* v. *Baldwin County Comm'rs.*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004); *Metts* v. *Murphy*, 363 F.3d 8, 11–12 (1st Cir. 2004) (*en banc*); *Martinez* v. *Bush*, 234 F. Supp. 2d 1275, 1320 n.56, 1322 (S.D. Fla. 2002) (three-judge panel); *Puerto Rican Legal Defense & Educ. Fund* v. *Gantt*, 796 F. Supp. 681, 694–95 (E.D.N.Y. 1992) (three-judge panel); *West* v. *Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge panel); *Armour* v. *Ohio*, 775 F. Supp. 1044, 1059–60 (N.D. Ohio 1991) (three-judge panel); *Jordan* v. *Winter*, 604 F. Supp. 807, 814–15 (N.D. Miss. 1984) (three-judge panel), *aff'd sub nom. Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002 (1984). *Cf. Martin* v. *Mabus*, 700 F. Supp. 327, 333 (S.D. Miss. 1988) (noting that 65% was not brightline and courts had to examine voting history and patterns of the district).

> potential to elect a representative of choice. . . . Indeed, a rule invariably requiring that minority voters be able to make up the majority in a single-member district could only be justified on the assumption that a Section 2 claim also requires that voting be *totally* polarized by race, *i.e.*, that no white voter will ever vote for the candidate preferred by the minority. But in our experience, that is almost never the case; although racially polarized voting does in some places reach extreme degrees, it is rarely if ever total.

Id. at *11–12 (emphasis in original). *See also* Br. for the Petitioners, at 28–29.

Further, there is nothing in the language of *Gingles* itself that requires a 50% rule. The Court in *Gingles* stated only that that the minority group seeking protection had to be "sufficiently large and geographically compact to constitute a majority in a single-member district" so as "to possess the potential to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 & n.17. *See also DeGrandy*, 512 U.S. at 1008 (interpreting the numerosity requirement in *Gingles* to mean "a sufficiently large minority population to elect candidates of its choice," rather than absolute numerical majority).

A 50% bright-line is also at odds with this Court's statements in Section 2 cases that reflect a flexible, fact-sensitive approach. *See Gingles*, 478 U.S. at 45 (requiring a "searching practical evaluation of the past and present reality" and "functional view of the political process"); *DeGrandy*, 512 U.S. at 1007 (noting that Section 2 test "cannot be applied mechanically"). The prerequisites in *Gingles* other than numerosity – that the minority plaintiffs be politically cohesive and that the white voters usually vote as a bloc so as to defeat the minority's candidate – are similarly flexible and fact-sensitive factors. *See Gingles*, 478 U.S. at 50–51.

Finally, a 50% rule would be antithetical to the overall purpose of the Voting Rights Act. As this Court has repeatedly recognized, "[t]he purpose of the Voting Rights Act is . . . to foster our transformation to a society that is no longer fixated on race." *Georgia* v. *Ashcroft*, 539 U.S. 461, 490 (2003) (citing *DeGrandy*, 512 U.S. at 1020; *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993)); *DeGrandy*, 512 U.S. at 1020 (describing the Voting Rights Act as "a statute meant to hasten the waning of racism in American politics"); *cf. Shaw*, 509 U.S. at 648 (warning against "exacerbat[ing] the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract").

Setting a 50% one-size-fits-all rule for every federal, state, and local legislative district in this

country would not only be unnecessarily rigid, it would adopt into the law an outdated assumption that a racial minority's only "opportunity . . . to elect" is when that *one race* puts a candidate into office, on the "*strength of their own ballots.*" *Hall*, 385 F.3d at 429 (emphasis in original).

The reality of the CBC's progress to date, outlined above, demonstrates that the African American community's preferred candidate has been elected more and more frequently from districts that are not majority African American, in certain parts of the country, where the candidate is able to forge cross-over or coalition appeal. Such a candidate reflects the African American community's "opportunity . . . to elect," just like the African American representative elected by a majority of his own race. Consistent with the aims of the Voting Rights Act, Section 2 should protect voters for the former as well as the latter.

CONCLUSION

For the foregoing reasons, this Court should conclude that a racial minority group representing less than 50% of a district's population may state a vote dilution claim under Section 2 of the Voting Rights Act. The Court should reverse the decision of the North Carolina Supreme Court.

Dated: June 17, 2008
New York, New York

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: Jeh Charles Johnson*
Layaliza Klein Soloveichik**

1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373–3000
jjohnson@paulweiss.com

Counsel for Amici Curiae

* Counsel of Record

** Assisted by Robert A. Weinstock (Columbia Law '09) and Jason M. Levy (Columbia Law '09).

APPENDIX A

African American Members Of The U.S. Congress*

U.S. Senate

Senator	Party	State	Term
Hiram Rhodes Revels	Republican	Mississippi	1870-1871
Blanche Bruce	Republican	Mississippi	1875-1881
Edward Brooke**	Republican	Massachusetts	1967-1979
Carol Moseley Braun	Democrat	Illinois	1993-1999
Barack Obama	Democrat	Illinois	2005-present

U.S. House of Representatives

Representative	Party	State	Term
Joseph H. Rainey	Republican	South Carolina	1870-1879
Jefferson F. Long	Republican	Georgia	1870-1871
Robert C. De Large	Republican	South Carolina	1871-1873
Robert B. Elliott	Republican	South Carolina	1871-1874
Benjamin S. Turner	Republican	Alabama	1871-1873
Josiah T. Walls	Republican	Florida	1871-1873, 1873-1875, 1875-1876
Richard H. Cain	Republican	South Carolina	1873-1875, 1877-1879

Representative	Party	State	Term
John R. Lynch	Republican	Mississippi	1873-1877, 1882-1883
James T. Rapier	Republican	Alabama	1873-1875
Alonzo J. Ransier	Republican	South Carolina	1873-1875
Jeremiah Haralson	Republican	Alabama	1875-1877
John A. Hyman	Republican	North Carolina	1875-1877
Charles E. Nash	Republican	Louisiana	1875-1877
Robert Smalls	Republican	South Carolina	1875-1879, 1882-1883, 1884-1887
James E. O'Hara	Republican	North Carolina	1883-1887

Representative	Party	State	Term
Henry P. Cheatham	Republican	North Carolina	1889-1893
John Mercer Langston	Republican	Virginia	1890-1891
Thomas E. Miller	Republican	South Carolina	1890-1891
George W. Murray	Republican	South Carolina	1893-1895, 1896-1897
George Henry White	Republican	North Carolina	1897-1901
Oscar De Priest	Republican	Illinois	1929-1935
Arthur W. Mitchell	Democrat	Illinois	1935-1943
William L. Dawson	Democrat	Illinois	1943-1970
Adam Clayton Powell, Jr.	Democrat	New York	1945-1967, 1969-1971

Representative	Party	State	Term
Charles Diggs	Democrat	Michigan	1955-1980
Robert N.C. Nix, Sr.	Democrat	Pennsylvania	1958-1979
Augustus F. Hawkins	Democrat	California	1963-1991
John Conyers, Jr.	Democrat	Michigan	1965-present
William L. Clay, Sr.	Democrat	Missouri	1969-2001
Louis Stokes	Democrat	Ohio	1969-1999
Shirley Chisholm	Democrat	New York	1969-1983
George W. Collins	Democrat	Illinois	1970-1972
Walter E. Fauntroy	Democrat	District of Columbia	1971-1991
Ronald V. Dellums	Democrat	California	1971-1998
Ralph Metcalfe	Democrat	Illinois	1971-1978

Representative	Party	State	Term
Parren Mitchell	Democrat	Maryland	1971-1987
Charles B. Rangel	Democrat	New York	1971-present
Yvonne Brathwaite Burke	Democrat	California	1973-1979
Cardiss Collins	Democrat	Illinois	1973-1997
Barbara Jordan	Democrat	Texas	1973-1979
Andrew Young	Democrat	Georgia	1973-1977
Harold Ford, Sr.	Democrat	Tennessee	1975-1997
Julian C. Dixon	Democrat	California	1979-2000
Melvin H. Evans	Republican	Virgin Islands	1979-1981
William H. Gray, III	Democrat	Pennsylvania	1979-1991

Representative	Party	State	Term
Mickey Leland	Democrat	Texas	1979-1989
Bennett M. Stewart	Democrat	Illinois	1979-1981
George W. Crockett	Democrat	Michigan	1980-1991
Mervyn M. Dymally	Democrat	California	1981-1993
Gus Savage	Democrat	Illinois	1981-1993
Harold Washington	Democrat	Illinois	1981-1983
Katie Hall	Democrat	Indiana	1982-1985
Major Owens	Democrat	New York	1983-2007
Edolphus Towns	Democrat	New York	1983-present
Alan Wheat	Democrat	Missouri	1983-1995
Charles Hayes	Democrat	Illinois	1983-1993

Representative	Party	State	Term
Alton R. Waldon, Jr.	Democrat	New York	1986-1987
Mike Espy	Democrat	Mississippi	1987-1993
Floyd Flake	Democrat	New York	1987-1998
John Lewis	Democrat	Georgia	1987-present
Kweisi Mfume	Democrat	Maryland	1987-1996
Donald M. Payne	Democrat	New Jersey	1989-present
Craig A. Washington	Democrat	Texas	1989-1995
Barbara-Rose Collins	Democrat	Michigan	1991-1997
Gary Franks	Republican	Connecticut	1991-1997
Eleanor Holmes Norton	Democrat	District of Columbia	1991-present

Representative	Party	State	Term
William J. Jefferson	Democrat	Louisiana	1991-present
Maxine Waters	Democrat	California	1991-present
Lucien E. Blackwell	Democrat	Pennsylvania	1991-1995
Eva Clayton	Democrat	North Carolina	1992-2003
Sanford Bishop	Democrat	Georgia	1993-present
Corrine Brown	Democrat	Florida	1993-present
James E. Clyburn	Democrat	South Carolina	1993-present
Cleo Fields	Democrat	Louisiana	1993-1997
Alcee Hastings	Democrat	Florida	1993-present
Earl Hilliard	Democrat	Alabama	1993-2003
Eddie Bernice Johnson	Democrat	Texas	1993-present

Representative	Party	State	Term
Cynthia McKinney	Democrat	Georgia	1993-2003, 2005-2007
Carrie Meek	Democrat	Florida	1993-2003
Mel Reynolds	Democrat	Illinois	1993-1995
Bobby Rush	Democrat	Illinois	1993-present
Robert C. Scott	Democrat	Virginia	1993-present
Walter Tucker	Democrat	California	1993-1995
Melvin Watt	Democrat	North Carolina	1993-present
Albert Wynn	Democrat	Maryland	1993-2008
Bennie Thompson	Democrat	Mississippi	1993-present
Victor O. Frazer	Independent	Virgin Islands	1995-1997

Representative	Party	State	Term
Chaka Fattah	Democrat	Pennsylvania	1995-present
Sheila Jackson Lee	Democrat	Texas	1995-present
J. C. Watts, Jr.**	Republican	Oklahoma	1995-2003
Jesse Jackson, Jr.	Democrat	Illinois	1995-present
Juanita Millender-McDonald	Democrat	California	1996-2007
Elijah Cummings	Democrat	Maryland	1996-present
Julia Carson	Democrat	Indiana	1997-2007
Donna Christian-Christensen	Democrat	Virgin Islands	1997-present
Danny K. Davis	Democrat	Illinois	1997-present
Harold Ford, Jr.	Democrat	Tennessee	1997-2007

Representative	Party	State	Term
Carolyn Cheeks Kilpatrick	Democrat	Michigan	1997-present
Gregory W. Meeks	Democrat	New York	1998-present
Barbara Lee	Democrat	California	1998-present
Stephanie Tubbs Jones	Democrat	Ohio	1999-present
William Lacy Clay, Jr.	Democrat	Missouri	2001-present
Diane Watson	Democrat	California	2001-present
Frank Balance	Democrat	North Carolina	2003-2004
Artur Davis	Democrat	Alabama	2003-present
Denise Majette	Democrat	Georgia	2003-2005
Kendrick Meek	Democrat	Florida	2003-present

Representative	Party	State	Term
David Scott	Democrat	Georgia	2003-present
G.K. Butterfield	Democrat	North Carolina	2004-present
Emanuel Cleaver	Democrat	Missouri	2005-present
Al Green	Democrat	Texas	2005-present
Gwen Moore	Democrat	Wisconsin	2005-present
Yvette Clarke	Democrat	New York	2007-present
Keith Ellison	Democrat	Minnesota	2007-present
Hank Johnson	Democrat	Georgia	2007-present
Laura Richardson	Democrat	California	2007-present
André Carson	Democrat	Indiana	2008-present

*Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H2495 (daily ed. Apr. 22, 2008) (letter from Rep. Wynn); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson).

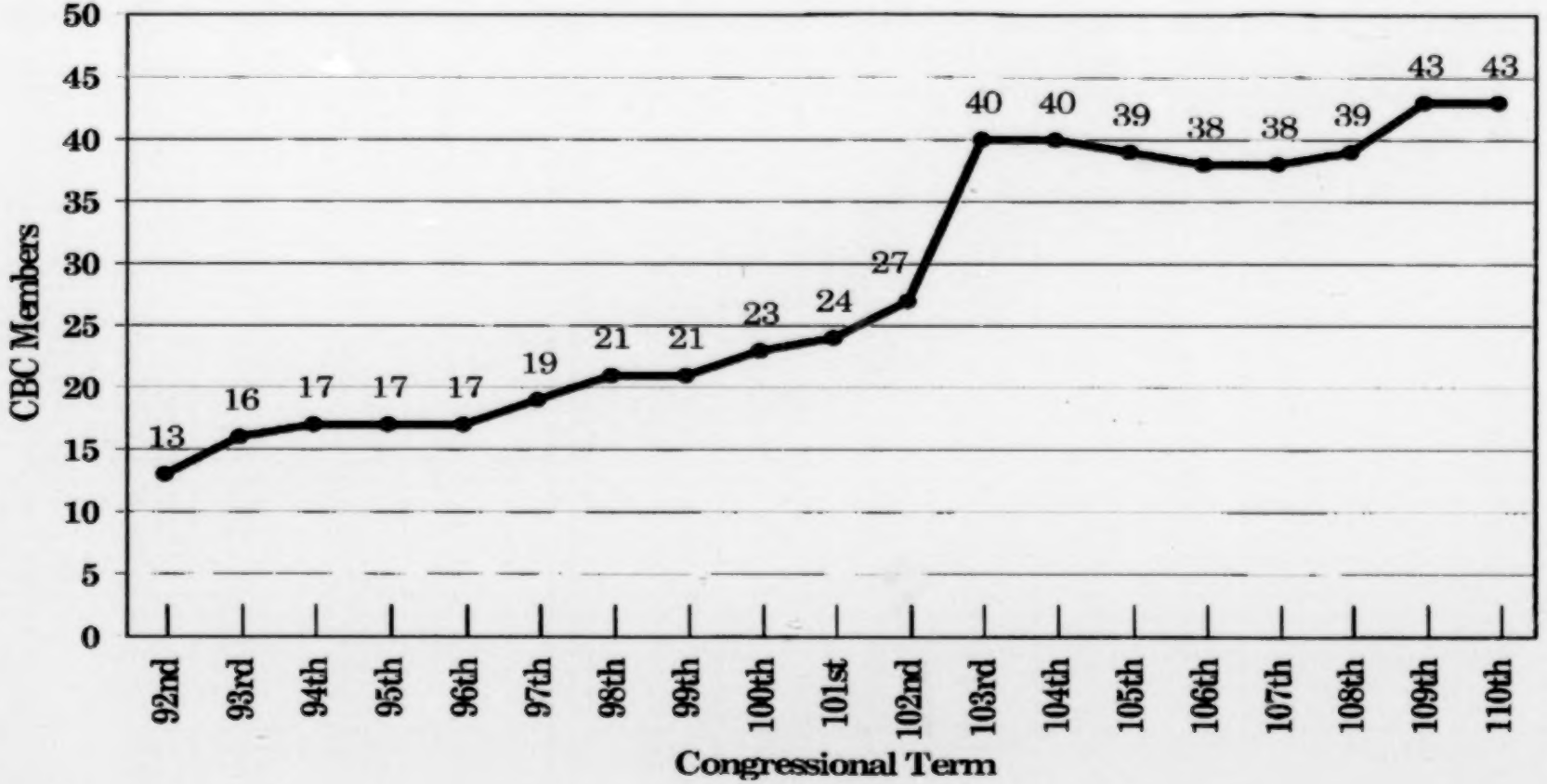
**Not a member of Congressional Black Caucus.

APPENDIX B

Number Of CBC Members By Congressional Term*

[Please see graph on following page]

* Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson). Representative J.C. Watts and Senator Edward Brooke did not join the CBC and are not included in this data.


CBC Members
50
45
40
35
30
25
20
15
10
5
0
13
16
17
17
17
19
21
21
23
24
27
40
40
39
38
38
39
43
43
92nd
93rd
94th
95th
96th
97th
98th
99th
100th
101st
102nd
103rd
104th
105th
106th
107th
108th
109th
110th
Congressional Term

Data Regarding Appendix B

110th Cong.: Although 45 CBC members were elected to serve in the 110th Congress, 43 was the largest number to serve at any one time. Rep. Juanita Millender-McDonald died on Apr. 22, 2007, and was replaced by Rep. Laura Richardson on Sept. 4, 2007. Julia Carson died Dec. 15, 2007 and was replaced by Rep. André Carson on March 13, 2008. Albert R. Wynn resigned on May 31, 2008. 108th Cong.: Although 40 CBC members were elected to serve in the 108th Congress, 39 was the highest number to serve at any one time. Rep. Frank Ballance resigned and was replaced by Rep. G. K. Butterfield. 107th Cong.: Although 39 CBC members were elected to serve in the 107th Congress, 38 was the highest number to serve at any one time. Rep. Julian Dixon, who was reelected to the 107th Congress, died before the commencement of the Congress and was later replaced by Rep. Diane Watson. 105th Cong.: Although 41 CBC members were elected to serve in the 105th Congress, 39 was the highest number to serve at any one time. Rep. Floyd Flake resigned and was replaced by Rep. Gregory Meeks, and Rep. Ron Dellums resigned and was replaced by Rep. Barbara Lee. 104th Cong.: Although 43 CBC members were elected to serve in the 104th Congress, 40 was the highest number to serve at any one time. Rep. Melvin J. Reynolds resigned and was replaced by Rep. Jesse L. Jackson Jr.; Rep. Walter Tucker resigned and was replaced by Rep.

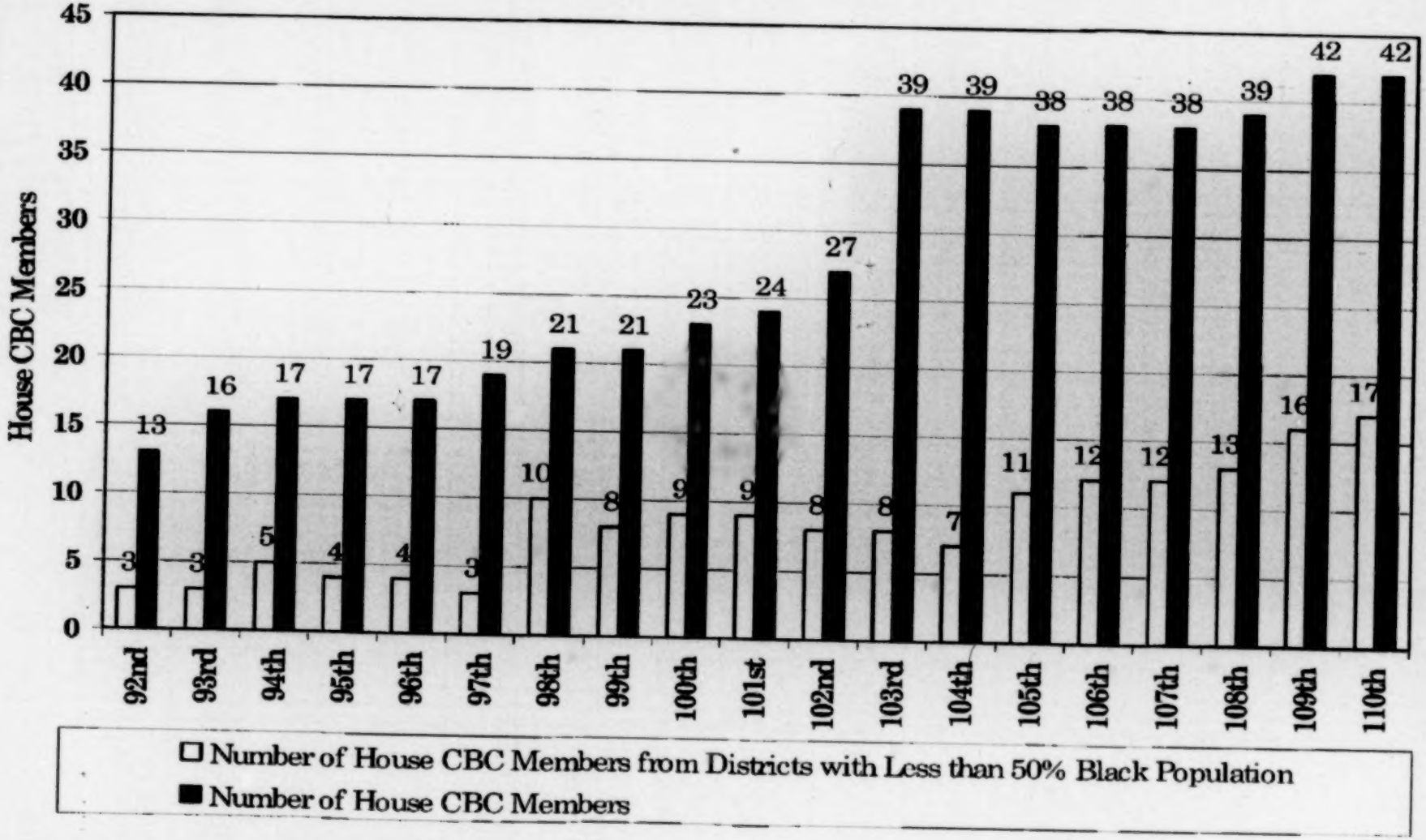
Juanita Millender-McDonald; and Rep. Kweisi Mfume resigned and was replaced by Rep. Elijah Cummings. 103rd Cong.: Although 41 CBC members were elected to serve in the 103rd Congress, 40 was the largest number to serve at any one time. Rep. Mike Espy resigned and was replaced by Rep. Bennie Thompson. 102nd Cong.: Although 28 CBC members were elected to serve in the 102nd Congress, 27 was the largest number to serve at any one time. Rep. William H. Gray III resigned and was replaced by Rep. Lucien Blackwell. 101st Cong.: Although 25 CBC members were elected to serve in the 101st Congress, 24 was the largest number to serve at any one time. Rep. Mickey Leland, who was killed in an airplane crash, was replaced by Rep. Craig Washington. 98th Cong.: Although 22 CBC members were elected to serve in the 98th Congress, 21 was the largest number to serve at any one time. Rep. Harold Washington resigned and was replaced by Rep. Charles Hayes. 96th Cong.: Although 18 CBC members were elected to serve in the 96th Congress, 17 was the largest number to serve at any one time. Rep. Charles Diggs Jr. resigned and was replaced by Rep. George Crockett.

APPENDIX C

Number Of House CBC Members From Cross-Over Or Coalition Districts – Determined Based On *Total* Population In District, Not Voting-age Population – As Against Total Number Of CBC Members In House In A Given Term *

[Please see graph on following page]

* Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson); THE ALMANAC OF AMERICAN POLITICS (various eds. 1972-2008) (using census data reflecting percentage of all blacks in population). Representative J.C. Watts did not join the CBC and is not included in this data. For four members of the 105th Cong., 2000 Almanac data rather than 1998 data has been used, so as to capture redistricting that occurred at that time. Data on the percentage blacks in the district was unavailable for one member each of the 102nd Cong., the 99th Cong., the 97th Cong., and the 96th Cong, and is therefore not reflected in this graph.


House CBC Members
45
40
35
30
25
20
15
10
5
0
92nd
93rd
94th
95th
96th
97th
98th
99th
100th
101st
102nd
103rd
104th
105th
106th
107th
108th
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42
42
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5
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10
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12
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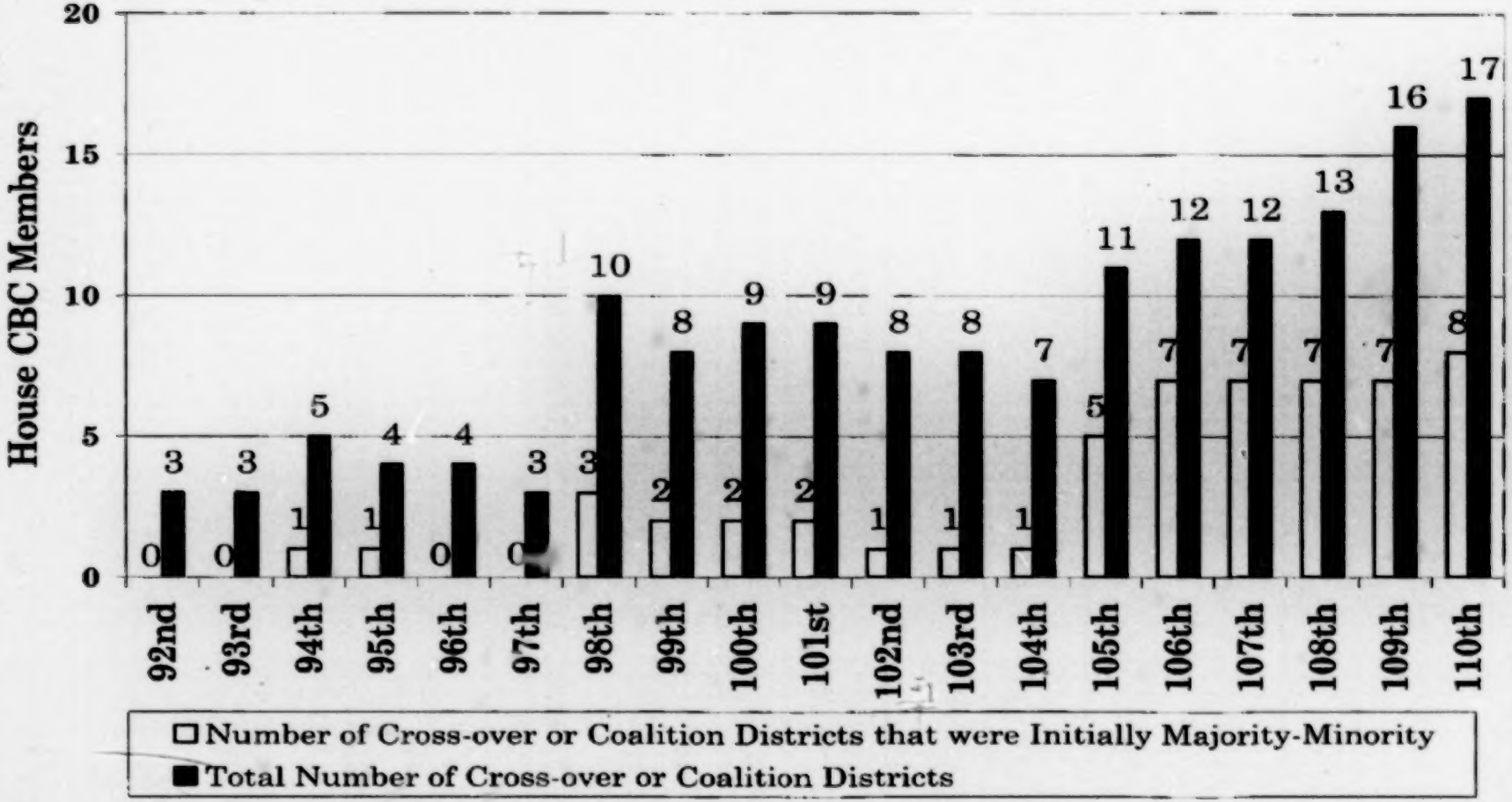
13
16
17
Number of House CBC Members from Districts with Less than 50% Black Population
Number of House CBC Members

APPENDIX D

Number Of House CBC Members Elected From Cross-over or Coalition Districts In A Given Term – Whose Districts When Initially Elected Were Majority-Minority – Compared To Total Number Of House CBC Members From Cross-over Or Coalition Districts That Term*

[Please see graph on following page]

* Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson); THE ALMANAC OF AMERICAN POLITICS (various eds. 1972-2008) (using census data reflecting percentage of all blacks in population). Demographic data from the 1972 elections was used with respect to Representative John Conyers, due to difficulty in obtaining data from 1964; 1972 was the earliest year for which data was readily available.


House CBC Members
20
15
10
5
0
92nd 93rd 94th 95th 96th 97th 98th 99th 100th 101st 102nd 103rd 104th 105th 106th 107th 108th 109th 110th
0 3 0 3 1 5 1 4 0 4 0 3 3 10 2 8 2 9 2 9 1 8 1 8 1 7 5 11 7 12 7 12 7 13 7 16 8 17
Number of Cross-over or Coalition Districts that were Initially Majority-Minority
Total Number of Cross-over or Coalition Districts

APPENDIX E

Percentage of African Americans In The Districts Of This Term's CBC Members – At The Time They Were First Elected And In The Past Election*

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
Barack Obama	IL-Sen.	(first term)	14.9
Sanford D. Bishop Jr.	GA-2nd	57	47.5
Corrine Brown	FL-3rd	55	49.3
G.K. Butterfield	NC-1st	50.5	50.5

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
André Carson	IN-7th	(first term)	29.4
Donna M. Christensen	Virgin Is.-Del.	N/A	76.2
Yvette D. Clarke	NY-11th	(first term)	58.5
William Lacy Clay Jr.	MO-1st	59.6	49.7
Emanuel Cleaver	MO-5th	24.2	24.2
James E. Clyburn	SC-6th	62.3	56.7
John Conyers Jr.	MI-14th	76	61.1
Elijah E. Cummings	MD-7th	71	58.8

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
Artur Davis	AL-7th	61.7	61.7
Danny K. Davis	IL-7th	65.6	61.6
Keith Ellison	MN-5th	(first term)	12.8
Chaka Fattah	PA-2nd	62.3	60.7
Al Green	TX-9th	37	37
Alcee L. Hastings	FL-23rd	51.7	51.2
Jesse L. Jackson Jr.	IL-2nd	68.4	62
Sheila Jackson Lee	TX-18th	51	40.1

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
William J. Jefferson	LA-2nd	65.7	63.7
Eddie Bernice Johnson	TX-30th	50	41.4
Henry (Hank) Johnson	GA-4th	(first term)	52.6
Stephanie Tubbs Jones	OH-11th	58.5	55.5
Carolyn Cheeks Kilpatrick	MI-13th	70.1	60.5
Barbara Lee	CA-9th	31.8	26
John Lewis	GA-5th	60	55.7
Kendrick Meek	FL-17th	55.2	55.2

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
Gregory W. Meeks	NY-6th	56.1	52.1
Gwen Moore	WI-4th	33	33
Eleanor Holmes Norton	DC-Del.	65.8	59.4
Donald M. Payne	NJ-10th	54	56.6
Charles B. Rangel	NY-15th	59	30.5
Laura Richardson	CA-37th	(first term)	24.8
Bobby L. Rush	IL-1st	69.6	65.2
David Scott	GA-13th	41	41
Robert C. Scott	VA-3rd	64	56

Member of Congress	Cong. Dist.	% African Americans in District's Population the Year Member Was First Elected	% African Americans in District's Population Today
Bennie G. Thompson	MS-2nd	63	63.2
Edolphus Towns	NY-10th	17	60.2
Maxine Waters	CA-35th	33.9	34.1
Diane E. Watson	CA-33rd	32.9	29.9
Melvin L. Watt	NC-12th	57	44.6
Albert R. Wynn	MD-4th	58.4	56.8

*Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson); THE ALMANAC OF AMERICAN POLITICS (various eds. 1972-2008) (using census data reflecting percentage of all blacks in

population); U.S. CENSUS BUREAU, POPULATION AND HOUSING PROFILE: 2000 FOR THE U.S. VIRGIN ISLANDS 2 (2002), http://www.census.gov/prod/cen2000/island/VIprofile.pdf). Demographic data from the 1972 elections was used with respect to Representative John Conyers, due to difficulty in obtaining data from 1964; 1972 was the earliest year for which data was readily available. Representative Albert Wynn (D-MD), resigned from Congress on May 31, 2008. *See* 154 CONG. REC. H2495 (daily ed. Apr. 22, 2008) (letter from Rep. Wynn).The Democrat running to succeed Wynn in the special election on June 17, Donna Edwards, is also African American. *See* Rosalind S. Helderman, *Wynn Wraps Up Tenure in House*, WASH. POST, May 31, 2008, at B2.

APPENDIX F

Percentage Of African Americans (BPOP And BVAP) In Districts Represented By Members Of The CBC Elected To The 110th Congress*

Member of Congress	Cong. Dist.	% African Americans in District	% African Americans of Voting-age in District
Barack Obama	IL-Sen.	14.9	14
Sanford D. Bishop Jr.	GA-2nd	47.5	44.2
Corrine Brown	FL-3rd	49.3	45.1
G.K. Butterfield	NC-1st	50.5	47.6
André Carson	IN-7th	29.4	26.7
Donna M. Christensen	Virgin Is.-Del	N/A	76.2
Yvette D. Clarke	NY-11th	58.5	56.8

Member of Congress	Cong. Dist.	% African Americans in District	% African Americans of Voting-age in District
William Lacy Clay Jr.	MO-1st	49.7	45.8
Emanuel Cleaver	MO-5th	24.2	21.8
James E. Clyburn	SC-6th	56.7	53.5
John Conyers Jr.	MI-14th	61.1	58.9
Elijah E. Cummings	MD-7th	58.8	57
Artur Davis	AL-7th	61.7	57.8
Danny K. Davis	IL-7th	61.6	55.9
Keith Ellison	MN-5th	12.8	10.2
Chaka Fattah	PA-2nd	60.7	56.5
Al Green	TX-9th	37	35.4
Alcee L. Hastings	FL-23rd	51.2	46.3

Member of Congress	Cong. Dist.	% African Americans in District	% African Americans of Voting-age in District
Jesse L. Jackson Jr.	IL-2nd	62	59.4
Sheila Jackson Lee	TX-18th	40.1	39.6
William J. Jefferson	LA-2nd	63.7	59.3
Eddie Bernice Johnson	TX-30th	41.4	40.4
Henry (Hank) Johnson	GA-4th	52.6	49
Stephanie Tubbs Jones	OH-11th	55.5	51.6
Carolyn Cheeks Kilpatrick	MI-13th	60.5	57.9
Barbara Lee	CA-9th	26	24.5
John Lewis	GA-5th	55.7	51.1
Kendrick Meek	FL-17th	55.2	51.3
Gregory W. Meeks	NY-6th	52.1	51.1

Member of Congress	Cong. Dist.	% African Americans in District	% African Americans of Voting-age in District
Gwen Moore	WI-4th	33	27.8
Eleanor Holmes Norton	DC-Del.	59.4	55.7
Donald M. Payne	NJ-10th	56.6	54.3
Charles B. Rangel	NY-15th	30.5	30.5
Laura Richardson	CA-37th	24.8	24.7
Bobby L. Rush	IL-1st	65.2	63.2
David Scott	GA-13th	41	37.4
Robert C. Scott	VA-3rd	56	52.7
Bennie G. Thompson	MS-2nd	63.2	58.9
Edolphus Towns	NY-10th	60.2	60
Maxine Waters	CA-35th	34.1	35

Member of Congress	Cong. Dist.	% African Americans in District	% African Americans of Voting-age in District
Diane E. Watson	CA-33rd	29.9	29.6
Melvin L. Watt	NC-12th	44.6	41.9
Albert R. Wynn**	MD-4th	56.8	55.3

* Sources: Mildred L. Amer, Congressional Research Serv., Order Code RL30378, Blacks in the United States Congress: 1870–2007, *passim* (2007) (updated as of September 27, 2007); 154 CONG. REC. H1660 (daily ed. Mar. 13, 2008) (statement welcoming Rep. Carson); THE ALMANAC OF AMERICAN POLITICS (Michael Barone ed. 2008) (using census data reflecting percentage of total blacks in population); Bureau of the Census, 110th Congressional District Summary File, Tbl. P5 available at http://factfinder.census.gov/servlet/DatasetTableListServlet?_ ds_name=DEC_2000_110H&type=table&_program=DEC&_lang=en&_ts=230490388528 (last visited June 15, 2008); U.S. CENSUS BUREAU, POPULATION AND HOUSING PROFILE: 2000 FOR THE U.S. VIRGIN ISLANDS 2 (2002), http://www.census.gov/prod/cen2000/island/VIprofile.pdf).

** Representative Albert Wynn (D-MD), resigned from Congress on May 31, 2008. *See* 154 CONG. REC. H2495 (daily ed. Apr. 22, 2008) (letter from Rep. Wynn). The Democrat running to succeed Wynn in the special election on June 17, Donna Edwards, is also African American. *See* Rosalind S. Helderman, *Wynn Wraps Up Tenure in House*, WASH. POST, May 31, 2008, at B2.

AMICUS CURIAE BRIEF

95

15

No. 07-689

FILED

JUN 17 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

GARY BARTLETT, *et al.*,

Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PETITIONERS

J. GERALD HEBERT
Counsel of Record
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW
Suite 650
Washington, DC 20036
(202) 736-2200
Attorneys for Amicus Curiae

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. Recently, the CLC served as counsel to *amici curiae* "Historians and Other Scholars" in support of petitioners in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). The CLC has a demonstrated interest in voting rights law and this case directly implicates the CLC's interest.

SUMMARY OF ARGUMENT

The fundamental principles of the Voting Rights Act (VRA), as explained by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny, support a general theory of vote dilution based on the "opportunity to elect" standard required by Section 2 of the VRA, 42 U.S.C. § 1973 – not on the ineffective and

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amicus* Campaign Legal Center contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Petitioners and Respondents consenting to the filing of this brief have been filed with the Clerk of this Court.

arbitrary "50% Rule" adopted by the North Carolina Supreme Court below.[2]

This theory is rooted in recognition of the fact that there are neither *per se* violations nor *per se* remedies under the VRA. Instead, violations and remedies under the VRA depend on local factors, such as the geographic distribution of racial groups, patterns of racially polarized voting, patterns of crossover voting among racial groups, and racial differentials in voter turnout. As a result, identical systems for electing public officials may impact minority voting strength differently from one jurisdiction to the next. Under some circumstances, such as where minority voter turnout is quite low based on a history of racial discrimination, and racial voting patterns are marked by a strong monolithic white bloc vote against minority-preferred candidates, a single-member district in which minority voters comprise 55% of the voting-age population in the district may nevertheless dilute minority voting strength. Under other circumstances, such as disproportionately high minority turnout and significant white crossover support for minority-preferred candidates, a single-member district in which minority voters comprise less than 50% of the voting-age

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[2] This general theory of vote dilution was originally detailed in a 1993 law review article co-authored by *amicus*' counsel of record J. Gerald Hebert, together with Dr. Allan J. Lichtman. *See* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1 (1993).

population in the district may provide minority voters with an effective opportunity to elect their preferred candidate.

In short, whether vote dilution exists does not turn solely on the racial composition of the district. Consequently, the application of Section 2 should not hinge on the mere presence of an arbitrary 50% numerical majority population of a minority group, but should instead entail consideration of the realistic potential of minority voters to elect candidates of their choice. There is no magic number with respect to a district's racial minority group population that definitively establishes whether that minority group's voting strength has been diluted in violation of the VRA. As some scholars have observed, "the Voting Rights Act, properly interpreted, should focus on actual election outcomes, not on rigid demographic 'cutoff lines' such as 50% black population." Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*. 79 N.C. L. Rev. 1383, 1385 (2001).

It is for this reason that *amicus* respectfully urges the Court to hold that a racial minority group that constitutes less than 50% of a proposed district's population *can* state a vote dilution claim under Section 2. Similarly, Section 2's protections should guard against the elimination of a district in which minority voters have shown a consistent and effective opportunity to elect their candidate of choice. In the case of North Carolina House District 18, minority

voters constitute less than 50% of the voting-age population, but nevertheless have been able to elect representatives of their choice. In such a case, minority voters have proven to be a "functional majority."[3] Any dilution of such a "functional majority's" ability to elect its candidates of choice should be deemed by this Court to present a cognizable claim under Section 2.

ARGUMENT

I. SECTION 2, AS INTERPRETED BY THIS COURT, GUARANTEES MINORITY GROUPS EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE AND DOES NOT ESTABLISH A 50% MINORITY POPULATION RESTRICTION ON SUCH OPPORTUNITY.

A racial or language minority group may state a claim under Section 2 of the Voting Rights Act when

[3] The term "functional majority" as used herein is consistent with this Court's decision in *Johnson v. De Grandy*, 512 U.S. 997 (1994), which examined Florida's legislative districts in a Section 2 challenge to determine which districts provided "a functional majority of Hispanic voters." *Id.* at 1004. The term functional majority is also devised from this Court's "repeated admonition [in *Gingles*] to federal judges to perform a 'functional' analysis of minority vote dilution, and to use their 'familiarity with the indigenous political reality' to conduct 'an intensely local appraisal' of the likely impact of the challenged plan, suggest[ing] a rejection of simple formulae or rules of thumb." Grofman, Handley & Lublin, *supra*, at 1389 (footnote omitted) (citing *Gingles*, 478 U.S. at 45, 62, 66-67, 73, 78-79).

"its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The plain language of the statute contains no reference to any numerical threshold nor uses the term "majority." The statute instead tracks this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and focuses on a minority group's ability to elect representatives of choice. "As the plain text of section 2 makes clear, the central focus of a minority voting rights challenge to a redistricting plan is its effect on minority voters' opportunities 'to elect representatives of their choice.'" Grofman, Handley & Lublin, *supra*, at 1387.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court set forth criteria to determine whether a minority group's voting strength has been submerged or diluted in white-controlled districts in violation of Section 2. *Id.* at 50-51. Although in *Gingles* the Court considered the application of Section 2 in the context of a challenge to multi-member districts, the principles announced in that case have since been applied to single-member districts. *See Growe v. Emison*, 507 U.S. 25 (1993). Under *Gingles*, a minority group may state a vote dilution claim under Section 2 where: it "is sufficiently large and geographically compact to constitute a majority in a single-member district"; it is "politically cohesive"; and where the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. The *Gingles* decision explicitly

reserved the question of whether Section 2 permits – as well as the standards that should pertain to – a claim brought by a minority group that would not constitute a majority in a single-member district. *Id.* at 46 n.12.

Though this Court in *Gingles* did not address the question of whether a minority group could establish a Section 2 violation if it comprised less than a numerical majority in a single-member district, the Court repeatedly referenced the *effectiveness* of the minority community within existing and proposed districts.[4] In doing so, the Court in essence looked at whether the minority group was functioning as an electoral majority in the district. Thus, in discussing the District Court's findings, the *Gingles* Court described the black communities at issue not in numerical terms, but as "sufficiently large and contiguous to constitute *effective* voting majorities in single-member districts." *Id.* at 38 (emphasis added). The Court also noted that "dilution of racial minority group voting strength may be caused by the dispersal of blacks

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[4] A functional majority district is not an influence district. An influence district, as this Court noted in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), is a district in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482 (citing *Shaw v. Hunt*, 517 U.S. 899, 947 n.21 (1996) (Stevens, J., dissenting); *Hays v. Louisiana*, 936 F. Supp. 360, 364, n.17 (W.D. La. 1996); *Johnson v. De Grandy*, 512 U.S. 997, 1011, 1012 (1994); *Gingles*, 478 U.S. 30, 98, 100 (1986) (O'Connor, J., concurring in judgment)).

into districts in which they constitute an *ineffective* minority of voters." *Id.* at 46 n.11 (citations omitted) (emphasis added).

This Court further explained in *Gingles* that:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Id. at 51 n.17 (emphasis in original).

The language in *Gingles*, that a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority," is simply a way of requiring minority voters to establish that under some alternative system of election, they would have the *potential* to elect representatives of choice in order to demonstrate a valid Section 2 vote dilution claim. Where, as in House District 18, minority voters may be shown to have sufficient strength to elect their candidates of choice with some crossover voting from non-minority group members, minority voters have the requisite potential to elect representatives – a potential that is destroyed if the minority group is split into districts such that it lacks an effective opportunity to elect the representatives of its choice.

Language in more recent Court decisions confirms that the "sufficiently large . . . to constitute a majority" language in *Gingles* established an effective, functional majority standard, not a mathematical majority standard. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), for example, this Court made clear that "no single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength," *id.* at 1020-21, and repeatedly stressed political "effectiveness" as the appropriate metric to gauge vote dilution. *See, e.g., id.* at 1000 ("minority voters form effective voting majorities in a number of districts"); *see also id.* at 1014 ("Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity"), *id.* at 1017 ("districts in which minority voters form an effective majority"), *id.* at 1023 n.19 ("an effective voting majority"), *id.* at 1024 ("an effective majority").

This Court again made clear in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that many factors beyond the mere racial or ethnic composition of a district must be considered when analyzing vote dilution and states should be allowed the flexibility to consider local circumstances.

> The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority

> group, a State may choose to create a certain number of safe districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice.

Id. at 480 (internal citations omitted) (citing *Gingles*, 478 U.S. at 48-49; *id.* at 87-89 (O'Connor, J., concurring in judgment)).

The use of functional majority districts to remedy or prevent Section 2 violations is thus fully consistent with the *Gingles* threshold requirement that a minority group demonstrate that it is "sufficiently large" to effectively function as a majority in a single-member district. *Gingles*, 478 U.S. at 50. Contrary to some lower court considerations of the issue, *see, e.g.*, *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999); *Negrón v. City of Miami Beach, Florida*, 113 F.3d 1563, 1571 (11th Cir. 1997),[5]

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[5] Although some courts have been attracted to the simplicity and clarity of a strict mathematical cutoff line [of 50%], others have opted to focus on whether a minority group has an "effective" voting majority, meaning that the minority group members are actually capable of electing their preferred candidates over the

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the *Gingles* requirement that a group be sufficiently large to constitute a majority should not be interpreted as a strict numerical majority requirement (inevitably based on out-of-date, incomplete census data). Such an interpretation is incompatible with the explicit statutory command of Section 2 that effects of the political system must be considered "based on the totality of circumstances" in a jurisdiction. 42 U.S.C. § 1973(b) ("A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . ."). As detailed below, variations in factors such as voter turnout, minority political cohesion, and white bloc voting all impact the potential for a minority group to function as a majority in a given district and, consequently, to elect representatives of their choice. The "totality of circumstances" test explicitly set forth in Section 2 requires that these factors be taken into consideration when determining whether a minority group is sufficiently large and geographically compact to elect the representatives of its choice.

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opposition of most, though not necessarily all, of the white voters in the district.

Grofman, Handley & Lublin, *supra*, at 1389 (footnotes omitted).

II. A "NUMERICAL MAJORITY" STANDARD INADEQUATELY PROTECTS MINORITY VOTING RIGHTS WHILE AN "OPPORTUNITY TO ELECT" STANDARD APPROPRIATELY ADVANCES THE PURPOSES AND INTENT OF SECTION 2.

A "numerical majority" standard inadequately reflects minority group potential for electoral success because the racial composition of a district is only one of the factors in measuring whether a district provides minority voters with an effective opportunity to elect their preferred candidate. Voting rights scholars have proposed "a conceptual framework for determining the percentage minority needed to create an effective minority district." Grofman, Handley & Lublin, *supra*, at 1393. Under this framework:

> The likelihood of electing a minority-preferred candidate to office depends on several factors: the relative rate at which minorities and whites participate in the electoral process, the degree to which minority and white voters support minority-preferred candidates, and the fact that the United States has a multi-stage electoral process that includes a primary election, a general election, and sometimes a run-off election as well. In order to determine the percentage minority necessary to provide minorities with an equal opportunity to elect minority candidates, *all* of these factors *must* be considered.

Id. at 1403-04 (emphasis added).

Thus, levels of voter turnout and the degree of voting cohesion among both minority and majority communities interact with the size of each community to create the full context in which the ability of a minority community to elect its candidate of choice must be considered. *Amicus* advocates employment of a "functional majority" standard, which adequately captures these factors and advances the purposes and intent of Section 2.

As this Court recognized in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), even in cases in which minority voters comprise a citizen voting-age majority, such a district may still "lack real electoral opportunity." *Id.* at 2615. If minority turnout is low or where white or Anglo bloc voting outweighs the cohesion of the minority community, majority-minority districts might still not enable minority voters to elect a candidate of choice. A majority-minority district in which whites turnout at much higher rates than minority voters may be controlled by white voters, even though white voters constitute a numerical minority within the district. Similarly, in a majority-minority district in which white voters are almost uniformly opposed to the minority candidate of choice and vote for the white opponent, and where minority support for a minority candidate, though substantial, is less uniform, minority voters still may be unable to elect their candidate of choice. Numerical majorities, even of the voting-age citizen population, simply do not ensure effective electoral opportunity.

In contrast, a cohesive minority group which makes up a large, but less than majority, percentage of voting-age citizens in a district can effectively elect a representative of its choice where some minimal crossover voting exists. In such functional majority districts, like House District 18 in this case, crossover voting reliably allows the minority community to elect their candidates of choice under most circumstances.

The following two tables illustrate the theory of vote dilution advanced by *amicus* here – the theory that factors other than strict numerical population weigh heavily on the ability of minority voters to elect the representatives of their choice. Consequently, differences in minority and white voting patterns and turnout explain why a district in which minority voters comprise 55% of the voting-age population may violate Section 2 in one jurisdiction and may be perfectly legal in another.

Table 1 analyzes two hypothetical districts with an identical 40% minority voting-age population. In hypothetical District 1, minority voter turnout is lower than white turnout and minority political cohesion is less than the level of white bloc voting. Under these conditions, white bloc voting would usually be sufficient to defeat the minority-preferred candidate. In hypothetical District 2, minority turnout equals white turnout, and minority cohesion is substantially greater than the degree of white bloc voting. Under these conditions, minority voters are able to elect a candidate of their choice.

Table 1
Projected Vote for Minority Candidate of Choice
Two Hypothetical Districts

District 1: Minority Voting-Age Population = 40%
Minority Turnout = 30%
White Turnout = 40%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.40) = 33%

1. Minority Vote for Minority Candidate	= .70 x 33%	=	23.1%*
2. White Vote for Minority Candidate	= .20 x 67%	=	13.4%**
3. Total Vote for Minority Candidate	= 23.1% + 13.4%	=	36.5%

District 2: Minority Voting-Age Population = 40%
Minority Turnout = 30%
White Turnout = 30%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.30) = 40%

1. Minority Vote for Minority Candidate	= .90 x 40%	=	36.0%*
2. White Vote for Minority Candidate	= .25 x 60%	=	15.0%**
3. Total Vote for Minority Candidate	= 36.0% + 15.0%	=	51.0%

*The minority vote for the minority candidate is the product of minority cohesion (70% in District 1 and 90% in District 2) and the percent minority among voters.

**The white vote for the minority candidate is the product of white crossover voting (20% in District 1 and 25% in District 2) and the percent white among voters.

Even districts with a population majority of minority-group members may violate Section 2 if, given district-specific circumstances, the level of minority concentration fails to provide minorities a realistic potential to elect candidates of their choice. Table 2 analyzes two hypothetical districts with 55% minority voting-age populations. In neither district are minority voters able to elect a candidate of choice, despite their numerical majority. Both districts are under the effective political control of the white electorate: District 1 because of the extremely low minority turnout and District 2 because of the monolithic white opposition to minority-preferred candidates.

Table 2
Projected Vote for Minority Candidate of Choice
Two Hypothetical Districts

District 1: Minority Voting-Age Population = 55%
Minority Turnout = 30%
White Turnout = 40%
Percent Minority Among Total Voters =
55x.30/(55x.30+45x.40) = 48%

1. Minority Vote for Minority Candidate	=	.75 x 48%	= 36.0%*
2. White Vote for Minority Candidate	=	.20 x 52%	= 10.4%**
3. Total Vote for Minority Candidate	=	36.0% + 10.4%	= 46.4%

District 2: Minority Voting-Age Population = 55%
Minority Turnout = 30%
White Turnout = 30%
Percent Minority Among Total Voters =
40x.30/(40x.30+60x.30) = 55%

1. Minority Vote for Minority Candidate	=	.80 x 55%	= 44.0%*
2. White Vote for Minority Candidate	=	.05 x 45%	= 2.3%**
3. Total Vote for Minority Candidate	=	44.0% + 02.3%	= 46.3%

*The minority vote for the minority candidate is the product of minority cohesion (75% in District 1 and 80% in District 2) and the percent minority among voters.

**The white vote for the minority candidate is the product of white crossover voting (20% in District 1 and 5% in District 2) and the percent white among voters.

Tables 1 and 2 make clear that the racial or ethnic composition of a district is merely a starting point in determining whether a district provides minority voters with an effective opportunity to elect a candidate of choice. To determine whether such an opportunity exists, it is also important to examine the levels of voter turnout and the extent of racial bloc voting among white voters (*i.e.*, crossover voting). Thus, although minority voters in Table 1 comprised only 40% of the population in the district, the combination of relatively low white voter turnout with significant white crossover voting would enable the minority group to elect its candidate of choice in Table 1 District 2. Conversely, relatively low minority voter

turnout or extreme bloc voting by whites in a majority-minority (55%) district could prevent minority voters from electing their preferred candidate.

III. AN "OPPORTUNITY TO ELECT" STANDARD IS CLEAR AND ADMINISTRABLE.

The court below has suggested that a bright-line population rule establishes the most easily administrable standard for minority districts. *See* Pet. App. 23a-24a. *Amicus* agrees that clear standards are necessary, but the "opportunity to elect" standard for functional majorities is also sufficiently clear and administrable and, more importantly, is a far more accurate measure of minority voter effectiveness than an arbitrary numerical population standard.[6]

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[6] The supposed advantages of a bright-line 50% rule, however, may prove chimerical. Creating a strict cut-off line generates several thorny issues: What is the relevant population base – total population, adult (or voting age) population (known as VAP), adult citizen population (known as CVAP), the population of registered voters, the population of voters who actually turn out on election day, the population of voters who turn out and do not "roll off" before getting far enough down the ballot to select a candidate for the office in question? If the answer is not total population or VAP, how does one estimate these figures, because they are not part of the Census Bureau's P.L. 94-171 redistricting database and therefore are not available when states have to draw new district lines? Even if total population or VAP is the relevant base, how does one count people who check off more than

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Interpreting Section 2 to require a numerical majority of minorities in any remedial district also places too much emphasis on Census figures. Census figures show the population composition at one specific snapshot in time, are outdated by the time they are released, and certainly stale by the time litigation over a redistricting plan is completed.

A district in which minority voters make up an arithmetical majority of citizens of voting age but are still unable to elect their candidate of choice is not a sufficient remedial district under Section 2. Similarly, a district with a numerical majority of white voters could, for all functional purposes, be an effective remedial district for minority voters if minority voters are able to elect their candidates of choice. It is the ability to elect, not the numerical configuration, that is relevant.

Indeed, given the integrationist goals of American public policy during the past 50 years, use of functional majority districts would be a better way to analyze vote dilution than simple reliance on whether the district is majority-minority. The reason for this is that a functional majority district, where minority voters comprise a substantial percentage of a district but fall just short of a numerical majority, will be the result of politically cohesive minority voters and some

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one racial category – for example, individuals who are both African-American and white."

Grofman, Handley & Lublin, *supra*, at n.25.

degree of crossover voting by whites. Such districts tend to promote interactions between whites and minorities and emphasize and encourage interracial coalitions. This is yet another reason that the remedial option of creating functional majority districts should not be foreclosed for the purpose of maintaining an arbitrary population standard.

In order to determine whether minority voters have sufficient strength in a district to elect their preferred candidate, litigants use past election results to determine voter turnout levels for minorities and whites, minority voter cohesion, and white bloc voting. In this analysis, the total percentages of voting-age residents must be adjusted to take into account voter turnout differentials. Thus, for example, if a district's voting-age population is 55% minority, but minorities vote at a rate of 30%, while non-minorities vote at a rate of 40%, the percentage of actual *voters* on Election Day would be only 48% minority (assuming complete racial polarization).

In addition to racial or ethnic differences in levels of voter turnout, the analysis must further consider evidence of racially polarized voting in the district. Racially polarized voting is composed of two elements: minority political cohesion and white bloc voting. In considering these two components of racially polarized voting, it is possible to examine the pattern of results for a variety of candidates and offices. Cohesive voting among minority voters is necessary for the minority group to have an opportunity to elect (and is also required in the second

Gingles prong). The extent to which a minority group votes cohesively, considered in combination with the size of the minority population in the district and its level of turnout, will determine the level of support that the minority community is able to provide to its candidate of choice. Thus, in a district with a 40% minority voting-age population, in which minority and non-minority voters had the same turnout rate, if 90% of the minority community supported its candidate of choice, that would supply 36% of the total votes in the district to that candidate. Such a candidate would need to obtain only 25% crossover votes from whites to be elected. The potential for crossover voting by whites can be gleaned from previous elections, and most probative in determining the likelihood of such crossover will be past elections in which minority candidates have run against white candidates.

IV. AN "OPPORTUNITY TO ELECT" STANDARD IS CONSISTENT WITH THE THIRD *GINGLES* FACTOR.

The use of functional majority districts to remedy Section 2 violations, based on an "opportunity to elect" theory taking into consideration crossover voting, does not clash with the third *Gingles* precondition that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. The court below mistakenly conflated the small amount of reliable crossover voting that makes a remedial

functional majority district possible, with large scale crossover voting that might undermine the *Gingles* white bloc voting precondition. *See* Pet. App. 25a-26a.

The limited, but reliable, amount of crossover voting by whites which enables minorities within functional majority districts to elect a candidate of choice is not inconsistent with the third prong of *Gingles*. As this Court held in *Gingles*, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56. And, again, stressing that local circumstances are of the utmost importance to vote dilution analysis, the *Gingles* Court continued: "The amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors . . . ." *Id.* (citations omitted).

It makes little sense to interpret the third *Gingles* prong to mean that where a small number of non-minority voters crossover to support minority supported candidates, no remedy exists under Section 2. To do so would run counter to the explicit statutory command of Section 2 that the practical effect of an electoral system must be measured against the "totality of circumstances" in a jurisdiction. Obviously, districts with some minimal crossover voting may nevertheless be under the effective political control of whites and violate Section 2. Just as violations of Section 2 may occur despite some crossover

voting by white voters for minority-preferred candidates, so too can districts be created to avoid or remedy a Section 2 violation that take into account some degree of white crossover voting in a district that will function as a minority opportunity district.

V. DISTRICT 18 IS A VALID REMEDIAL DISTRICT UNDER THE SECTION 2 "OPPORTUNITY TO ELECT" STANDARD.

North Carolina House District 18 perfectly illustrates how a functional majority district provides a minority group comprising less than a numerical majority of a district's population with the opportunity to consistently elect its candidates of choice. District 18 is a valid remedial district under the Section 2 "opportunity to elect" standard.

House District 18, as designed by the North Carolina legislature, has an African-American voting-age population of 39.36% (and a total African-American population of 42.9%). *See* Pet. App. 5a. "In House District 18, election results have already established that minority voters have the potential to elect a representative of choice .... Unquestionably, a black candidate can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent." Pet. App. 46a. Indeed, it is undisputed that the presently-constituted District 18 has for years consistently elected the candidate of choice of African-American voters. *See* Pet. App. 70a.

Another important local condition that undoubtedly impacts the ability of District 18's black voters to elect their candidates of choice, but that is not captured by a numerical majority-driven analysis of vote dilution, is the role that party primary elections have played in determining the candidate of choice. As a general matter in numerous North Carolina districts, black candidates who win Democratic Party primary elections go on to win the general election with the assistance of a small but predictable level of crossover support by non-black voters. *See* J.A. 123-26 (Engstrom Rept. Tbls. 1-2). In District 18, 53.7% of registered Democrats are black. Pet. App. 70a. Registered Democrats outnumber registered Republicans by a 2-1 margin in District 18. *Id.* Unsurprisingly, the Democratic nominee in District 18 is consistently the victor in the general election. These local factors of Democratic Party dominance and black voter majority status within the Democratic Party have made District 18 a functional majority-minority district for black voters within it.[7]

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[7] Voting rights scholars have noted the important role that party primaries can play in assessing minority voters' ability to elect a candidate of their choice. As Grofman, Handley and Lublin have observed:

> [T]he percent black needed to win the Democratic primary is usually considerably lower than the percent needed to win the runoff or the general election – and sometimes the highest percentage is in the runoff, sometimes in the general election . . . .
>
> The highest of the three percentages necessarily interests us most because it is the percentage needed for the black-preferred candidate to win all three elections –

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Given the undisputed facts regarding District 18, it is clear that black voters within it have realized their full potential to elect their preferred candidate in the district. For the purpose of Section 2 vote dilution claims, what matters most is this difference between a minority population that, based on the facts and circumstances on the ground, would have the ability to elect its candidates of choice and one that would lack such ability. Again, this Court explained in *Gingles* that the purpose of the "sufficiently large and geographically compact" requirement is to make clear that, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n.17 (emphasis in original). But where, as in District 18, minority voters *clearly possess the potential* to elect representatives as a result of the challenged district, such minority voters would clearly be injured by the destruction of the district.

As Justice Souter observed for the Court in *De Grandy*: "[S]ociety's racial and ethnic cleavages

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> the Democratic primary, the Democratic runoff and the general election – and attain a seat in the legislature. The fact that the highest percentage black needed to win is not always found in the general election illustrates the importance of examining all stages of the election process, and not simply relying on an analysis of the general election.

Grofman, Handley & Lublin, *supra*, at 1409-1411 (footnote omitted).

sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." *De Grandy*, 512 U.S. at 1020. But such circumstances, he added, "should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Id.* District 18 in North Carolina is exactly such a district.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the Supreme Court of North Carolina should be reversed.

Dated: June 2008

Respectfully submitted,

J. GERALD HEBERT
Counsel of Record
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW
Suite 650
Washington, DC 20036
(202) 736-2200

AMICUS CURIAE BRIEF

101

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In the Supreme Court of the United States

GARY BARTLETT, ET AL.,

Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,

Respondents.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Jeremiah M. Hawkes
General Counsel
Carlos G. Muñiz
Special Counsel
Florida House
of Representatives
422 The Capitol
Tallahassee, FL 32399
(850) 488-7631

BILL MCCOLLUM
Attorney General
Scott D. Makar*
Solicitor General
Craig D. Feiser
Deputy Solicitor
General
State of Florida
Office of the
Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300
(850) 410-2672 (fax)
**Counsel of Record*

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973?

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STATEMENT OF AMICUS INTEREST[1]

The Florida House of Representatives ("Florida House") has a direct interest in this case because of its need for a clear redistricting standard under the Voting Rights Act that can be implemented in light of Florida's unique and ever-changing demographics. Without a clear "majority-minority" standard for potential VRA dilution claims, the Florida House cannot effectively draw districts that comply with federal law. Florida's population trends change frequently, and as such any standard below the majority-minority threshold would be unworkable for Florida to implement with any certainty, thereby vastly increasing the potential for claims under Section 2 of the VRA. Courts would then have to create standards to decide whether competing minority populations below a numerical majority could nonetheless have the potential to elect their candidates of choice, thereby effectively taking redistricting decisions out of the hands of the Florida Legislature.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the North Carolina Supreme Court in *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007). In holding that a minority group must show that it makes up a numerical majority of the population in a proposed district to state a Section 2 claim under the Voting

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[1] All parties to this case have consented to the filing of this amicus brief, and consent letters are on file with the Clerk of Court.

Rights Act, the North Carolina court complied with both the literal language of the VRA as well as this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In adopting the "50% (plus one) rule"[2] as a threshold for Section 2 claims, the court below followed the holdings of all federal circuit courts that have decided the issue, reasoning that a numerical majority requirement is the most objective and workable rule that will allow legislatures to do their jobs with less judicial interference in the political process of drawing electoral districts.

In passing the VRA, Congress intended to remedy past discrimination and provide equal electoral opportunities to all voters regardless of race. Congress intended to protect minority groups from discrimination, not to give them a preferred right to elect their candidate of choice. As such, the VRA does not create a preferred status for any particular group; it only ensures that all groups can vote on equal footing. A clear numerical "majority-minority" rule comports with the intent of the VRA by recognizing the need for an equal opportunity to elect a candidate, without creating a *right* to elect a preferred candidate for groups that comprise less than a majority of a proposed district's population.

The "50% rule" also adheres to this Court's holding in *Gingles* by giving the threshold requirement of a "majority" in any proposed district its natural and ordinary meaning. Although this

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[2] This bright-line threshold will be hereinafter referred to as "the 50% rule" or the "majority-minority" rule.

Court has never specifically adopted the threshold rule, the Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuit courts of appeal have interpreted the VRA and *Gingles* to suggest a "majority-minority" rule; no circuit has clearly adopted a contrary standard or interpretation of the first *Gingles* threshold. Furthermore, in amending Section 5 of the VRA (dealing with re-districting, pre-clearance and retrogression) in 2006, Congress made clear that so-called "coalition districts" (proposed districts with less than a numerical majority of minority voters, but with crossover votes from other groups) are *not* protected in the redistricting process. As such, adoption of the "50% rule" for purposes of Section 2 comports with the retrogression analysis of Section 5. This Court should therefore adopt the "50% rule" as the standard under the first *Gingles* prong.

The North Carolina court was also correct in reasoning that the accepted "50% rule" is easy for legislatures to administer and will reduce the number of cases in which the judiciary must intrude into redistricting decisions. Without a clear "majority-minority" standard, courts will increasingly engage in complicated decisions regarding sufficient minority populations to potentially elect preferred candidates. The judiciary will also have to resolve conflicting claims involving competing minority groups. In other words, by requiring legislatures to protect "coalition districts" without a clear, objective standard or population percentage that must be met by groups claiming dilution, a veritable "Pandora's Box" of litigation will

be opened that will obstruct redistricting for years to come.

It is important for this Court to recognize that the VRA does not protect the opportunities of *political parties* to potentially elect their candidates of choice, but instead protects opportunities for *minority groups* to vote free from discrimination. By adopting the Petitioners' requirement that legislatures take heed of "coalition districts" in the redistricting process or face dilution claims, however, this Court would be protecting the rights of less-than-majority minority groups to band with other groups to elect candidates from their shared political party. This result is not the purpose of the VRA.

Lastly, adopting the "50% rule" threshold would comport with principles of equal protection. Should this Court require legislatures to protect "coalition districts," it would be sanctioning the dispersion and dilution of minority voting power. It is axiomatic that Section 2 deals only with vote dilution, and adhering to a "50% rule" as a threshold to state a dilution claim would not discourage the formation of coalitions between groups or sanction the intentional "packing" of minority groups into districts where they are not naturally located. Instead, a "majority-minority" threshold simply requires legislatures to pay attention to naturally occurring, compact minority districts or face dilution claims. This standard aligns with the limited intent of the VRA as well as equal protection principles because it prevents dilution of minority voting power by protecting against the "unpacking" of natural majority-minority districts. Accordingly, this Court

should affirm the North Carolina Supreme Court and hold that when a minority group constitutes less than 50% of a proposed district's population, there can be no vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

ARGUMENT

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT COMPLIES WITH THE VOTING RIGHTS ACT, *GINGLES*, AND DECISIONS FROM ALL FEDERAL CIRCUITS THAT HAVE CONSIDERED THE "MAJORITY-MINORITY" REQUIREMENT.

The decision of the North Carolina Supreme Court in *Bartlett* complies with the literal language of Section 2 of the Voting Rights Act as well as this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986). It follows the holdings of all federal circuit courts that have decided the issue by reasoning that a minority group must show that it makes up a numerical majority of the population in a proposed district, and thereby could potentially elect the candidate of its choice. This "50% rule" has been held to be the most workable rule that will allow legislatures to do their jobs with less judicial interference in the inherently political process of drawing electoral districts.

A. The VRA and *Gingles* dictate that a clear "majority-minority" threshold should be the standard.

Congress intended to remedy past discrimination and provide equal electoral opportunities to everyone through the passage of the Voting Rights Act. Section 2(a) of the VRA prohibits any electoral practice or procedure that "results in the denial or abridgement of the right . . . to vote on account of race or color," while Section 2(b) states that Section 2(a) is violated if, "based on the totality of the circumstances, it is shown that the political processes leading to the nomination or election" of candidates are not "equally open to participation by" minority voters, such that minority voters "have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(a); 42 U.S.C. § 1973(b) (emphasis added).

Importantly, the VRA does not set standards for legislative drawing of district lines, and Congress has never stated in Section 2 that it had any intent to interfere with state legislative duties to construct electoral districts. The intent of the VRA is simply to protect minority groups from discrimination and vote dilution, not to give them a preferred right to elect their candidates of choice. In short, the Act is about equal and nondiscriminatory electoral *opportunities*, not about creating an affirmative preferred status of any particular group. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 152 (1993). The VRA does not protect any specific group; instead, all groups are guaranteed equal footing in every election, and they

have to work equally at building coalitions if they do not make up a numerical majority on their own. A clear numerical "majority-minority" threshold rule comports with the purpose and intent of the VRA by recognizing the need for an equal and clear opportunity to elect a candidate without creating a right to elect a preferred candidate for groups that comprise less than a majority of a proposed district's population.

Moreover, the "50% rule" comports with this Court's holding in *Gingles* by giving the threshold requirement of a "majority" in any proposed district its natural and ordinary meaning. The three preconditions for proving vote dilution this Court set forth in *Gingles* are: (1) that the minority group demonstrate "that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district"; (2) "that it is politically cohesive;" and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50 (emphasis added). The North Carolina Supreme Court correctly gave the word "majority" in the first precondition its most clear and natural reading, and the one supported by overwhelming federal courts precedent: the first precondition requires a numerical majority. *Bartlett*, 649 S.E.2d at 372-73.

As the North Carolina Supreme Court noted, *Gingles* used the word "majority" in the first precondition to establish the impossibility of violating Section 2 unless a majority-minority district can be created. In other words, minority voters "cannot claim to have been injured by [a

challenged] practice or structure if their preferred candidate cannot prevail even in its absence." *Gingles*, 478 U.S. at 50 n.17. The North Carolina court therefore correctly pointed out that the first threshold requirement is essential to determine whether "minority voters possess the potential to elect representatives in the absence of the challenged practice or structure." *Bartlett*, 649 S.E.2d at 373 (quoting *Gingles*, 478 U.S. at 50 n.17). Without a clear majority-minority rule, courts are faced with the intractable task of determining whether a non-majority group has the potential to state a claim under Section 2 of the VRA. *See id.*

The Amici States discuss the Senate Report accompanying the 1982 amendments to Section 2 as demonstrating that courts should "undertake a functional review of § 2 claims, and to focus their analysis on the totality of the circumstances rather than the presence or absence of a single factor." Amici States Brief, pg. 15. This analysis misses the point, however, that this Court stated in *Gingles* that claimants must *first* establish the *threshold* requirements for a vote dilution claim, *before* it can be determined whether, under the totality of the circumstances, their voting rights have actually been diluted. The first threshold factor is to establish a majority of the population that would create an opportunity, absent the challenged practice or structure, to actually elect the minority group's preferred candidate. Nothing in the legislative history from 26 years ago (five years before *Gingles* was decided) conflicts with this threshold requirement.

The holding of the North Carolina Supreme Court therefore finds clear support in the VRA and *Gingles*, and it gives the Act its intended effect. Lacking a majority, citizen groups must work and campaign for their desired candidates on the same footing as other groups, as there is no specific obligation to provide a preferred opportunity to any specific group where no clear majority exists.

B. Federal circuit courts have universally adopted the numerical "majority-minority" rule as a threshold requirement under the VRA and *Gingles*.

The "majority-minority" approach has gained acceptance among all the federal circuit courts that have interpreted the first *Gingles* precondition. The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have adopted or favorably discussed the "50% rule," and no circuit has clearly adopted a contrary standard or interpretation of the first *Gingles* threshold.

More than twenty years ago, the Seventh Circuit Court of Appeals was the first to weigh in on the initial threshold requirement for a vote dilution claim under Section 2 of the Voting Rights Act. In *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), African American voters challenged the city's at-large voting system as diluting their votes under the VRA. The Seventh Circuit affirmed summary judgment in favor of the city because the voters did not demonstrate that their minority group would make up a majority in a proposed district. The

minority population in *McNeil* made up less than ten percent of the total population, and as such the *Gingles* threshold was not satisfied. *See id.* at 939, n.2, 942.

The court explained that *Gingles* "combines the desire of Congress to remove barriers to section 2 claims with the Court's concern that without preconditions section 2 as amended might lead to a multitude of essentially irremediable claims." *Id.* at 943. As such, "[m]ovement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations." *Id.* at 944. The bright-line "majority-minority" rule gives courts clarity in deciding whether minorities can elect candidates in their proposed districts, and even though they may be able to elect their candidates without a numerical majority, "that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a brightline test." *Id.*

The court therefore adhered to the bright-line "50% rule," reasoning that the only way a minority group can show that its potential to elect is "solid and substantial," and not "speculative," is to demonstrate that it comprises a majority in the district that could not be overcome by any other voting bloc. *See id.* Because the minority group in *McNeil* did not comprise a majority of the voting population in either potential district, there could be no violation of Section 2 of the VRA. *See id.*; *see also Latino Political Action Comm. v. City of Boston*, 609 F. Supp. 739 (D. Mass. 1985) (holding that Boston's districting plan did not dilute Hispanic voting strength because the minority group could not show

that a district containing a Hispanic voting majority could be created).

The Tenth Circuit favorably discussed this interpretation in *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996). Although the court held that a state legislative district unlawfully diluted Hispanic voting strength under Section 2 of the VRA, the court reasoned that the first *Gingles* precondition ("sufficiently large and geographically compact") requires a "majority-minority" determination in order to determine whether there is a possibility of a Section 2 remedy. *See id.* at 1311. Otherwise, "if the minority group is small and dispersed, no single member district could be created to remedy its grievance." *Id.* As such, the court found that "satisfaction of the first [*Gingles*] precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible." *Id.* at 1314.

In *Negron v. City of Miami Beach, Florida*, 113 F.3d 1563, 1568 (11th Cir. 1997), the Eleventh Circuit Court of Appeals held that a Hispanic minority group had failed to meet the first *Gingles* prerequisite when it failed to show a single district where Hispanics could form a majority. The court explained that because no numerical majority population existed in any of the proposed Hispanic districts, there could be no Section 2 violation. *See id.*[3] The court reasoned that "if, although

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[3] As Respondents point out in their opposition to the petition, the Eleventh Circuit arguably addressed this issue in dicta in a subsequent decision, *Dillard v. Baldwin County Commissioners*, 376 F.3d 1260 (11th Cir. 2004). In *Dillard*, the (Continued...)

geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 1569. In other words, the court recognized that the minority group by itself has to make up a numerical majority in order to have the possibility of electing its preferred candidate.[4]

Eleventh Circuit stated that the *Gingles* precondition requires some sort of "threshold level of numerical substantiality" for the minority group, and it appeared to acknowledge, in a footnote, that this level need not be a strict numerical majority. *See id.* at 1265-66, n.5. Nonetheless, the court held that the minority group's less than 10% population did not meet this threshold. *See id.* at 1266. In any event, nothing in *Dillard's* dicta changes the prior Eleventh Circuit panel's reasoning in *Negron*.

[4] More recently, the Eleventh Circuit addressed the issue of so-called "influence districts" as a remedy under the VRA. In *Thompson v. Glades County Board of Commissioners*, 493 F.3d 1253 (11th Cir. 2007), the court found that a proposed district with a 50.23% African American population – a razor-thin numerical majority – was nonetheless satisfactory under the first *Gingles* prong. The court reversed a district court decision that held that the proposed district, while a very slim majority, was nonetheless an "influence district" that did not satisfy the "majority" requirement of *Gingles*. *See id.* at 1267. Moreover, the Eleventh Circuit panel reasoned that "crossover votes" (i.e., coalitions between blacks and whites) would make the slim majority-minority district satisfactory under the VRA. *See id.* at 1264. The county sought rehearing en banc, however, and the full Eleventh Circuit split equally, 6-6, on rehearing, thereby affirming the district court's reasoning by operation of law. *See Thompson v. Glades County Board of County Commissioners*, (Continued...)

The Fifth Circuit addressed the first *Gingles* precondition in *Valdespino v. Alamo Heights Independent School Dist.*, 168 F.3d 848 (5th Cir. 1999), explicitly holding that a minority group had to prove that it exceeded 50% of the population in the proposed district to meet the first *Gingles* threshold. The court emphatically held that "we reject the appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population." *Id.* at 850. Accordingly, because Hispanics made up "only 47.9%" of the voting age citizen population, the minority group could not meet the initial *Gingles* precondition to state a Section 2 claim. *Id.* at 851.

The court stressed that it "has interpreted the *Gingles* factors as a bright line test," and as such "vote dilution claimants [must] prove that their minority group exceeds 50% of the relevant population in the demonstration district." *Id.* at 852. The court based this determination on this Court's reference to a "majority" in *Gingles*, and as such 50% would have to be the threshold population in a proposed district. *See id.* Only upon proving a numerical majority exists would the plaintiffs be able to attempt to prove vote dilution under the VRA.

2008 WL 2599661 (11th Cir. 2008); *see also Thompson*, 493 F.3d at 1273 (Tjoflat, J., dissenting) ("I cannot conclude that the district court clearly erred in declining to account for the white crossover vote in its analysis of whether the plaintiffs satisfied the first *Gingles* requirement."). In other words, not only are "coalitions" not subject to consideration as to the first *Gingles* threshold in the Eleventh Circuit, one district court also held that a slim *numerical majority* may fail to meet the first *Gingles* requirement.

Most recently, in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), the Fourth Circuit Court of Appeals addressed the issue, holding that unless African American voters could prove that they actually had less opportunity than other groups to elect their preferred candidates, there could be no Section 2 claim. Because the minority plaintiffs in *Hall* were "not sufficiently numerous to form a voting majority in any single-member district in the Commonwealth of Virginia," they could not demonstrate that they would have the opportunity to elect their candidates with the drawing of the proposed district. *Id.* at 423. The court therefore affirmed dismissal of the plaintiffs' case.

In the reconfigured district at issue in *Hall*, the court pointed out that blacks only constituted 33.6 percent of the total population. *See id.* at 424. The court refused to recognize a potential district with less than a numerical majority of the minority group, along with alleged "crossover" voting from other groups, as a potential basis for a claim under the VRA. Instead, the court stated that "*Gingles* states very clearly that Section 2 plaintiffs must demonstrate that a minority group is large enough to form 'a majority' in the district," and as such "minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district." *Id.* at 427, 429 (emphasis in original).

The court concluded that when minority groups are too small to form a majority in their proposed districts, "they have no ability to elect

candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates," and therefore they cannot show that their electoral opportunities have been diluted under Section 2. *Id.* (emphasis in original). Only by establishing the *independent* ability to dictate electoral outcomes can proposed districts meet the *Gingles* threshold, and as such "[a]s a group that could only form a minority of the voters in [the proposed district] even before the Plan's enactment, the ability to elect candidates of their own choice" would never be possible for minority groups. *Id.* at 430. Without this lost opportunity to vote on equal footing with other voters, there can be no claim for dilution.

In *Hall*, the court emphasized that the minority group constituted only 40% of the former district's population before redistricting, and therefore the group possessed the same opportunities as all other groups "that cannot form a majority of the voters in the district." *Id.* at 431. While a minority group that comprises less than a numerical majority can still join with other groups to elect a preferred candidate, "such groups will be obliged 'to pull, haul, and trade to find common political ground' with other voters in the district." *Id.* (*quoting Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). A Section 2 claim cannot be based on alleged lost opportunities to form coalitions with other political groups, and groups cannot state a claim for vote dilution based on an alleged entitlement to a preferred voting opportunity. *See id.*; *see also Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) ("To the extent that African-American voters have to rely on cross-over voting to prove that they have the 'ability

to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their candidate is undercut.").

The North Carolina Supreme Court properly followed the reasoning and holdings of these federal courts, each adopting the "50% rule." All have concluded that the only way groups may demonstrate illegal vote dilution is to first show that they could have elected the candidate of their choice; and the only way their candidate could win an election is if a minority group's numbers are sufficient to elect the candidate without help from any other group. Absent the ability to create a numerical "majority-minority" district, no lost electoral opportunity exists, exactly what Congress intended in passing the VRA.[5]

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[5] Notably, the United States has agreed with this "majority-minority" position as amicus curiae in past cases before this Court. The United States has stated that it agrees with federal courts that have rejected the possibility "that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." *See* Br. for the U.S. as Amicus Curiae at 16, *Voinovich v. Quilter* (No. 91-1618). The government has reasoned that "[u]nless a minority group can demonstrate that it *could* constitute a majority so as to enable it to elect its preferred candidates, the alleged fragmentation of that group's voters into multiple districts could not possibly have denied that group an equal 'opportunity' to elect representatives of [its] choice.'" *Id.* at 11; *see also* Br. for U.S. as Amicus Curiae at 7, *Grove v. Emison* (No. 91-1420) ("[a]bsent proof that the plaintiff minority group could form a majority of a single-member district, that group 'cannot claim to have been injured by' the challenged districting scheme.") (citations omitted). In one case, however, the United States did assert (Continued...)

C. This Court's adoption of a "majority-minority rule" for Section 2 vote dilution claims would comport with Section 5 of the VRA.

Petitioners argue that adoption of the "50% rule" would create disharmony between Section 2 and Section 5 of the Voting Rights Act, as well as this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Similarly, the Amici States argue that the Court's rejection of the "50% rule" in *Ashcroft* counsels against adoption of the rule in the Section 2 context. Both Petitioners and the Amici States miss the mark in attempting to strictly align Section 2 vote dilution claims with Section 5 redistricting, retrogression, and pre-clearance issues.

As the Amici States recognize, this Court in *Ashcroft* explicitly stated that Section 2 (vote dilution) and Section 5 (pre-clearance and retrogression) "'combat different evils'" and "'impose very different duties upon the States.'" *Ashcroft*, 539 U.S. at 478 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)). Claims for vote dilution brought by individuals or minority groups differ significantly from the pre-clearance requirements that states face in demonstrating that there is no "retrogression" (backsliding) in voting opportunities for minority groups when district lines are periodically redrawn. The Court noted in *Ashcroft*

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that a near-majority minority population might in some cases be able to state a claim for vote dilution. *See* Br. for U.S. as Amicus Curiae at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.* (No. 98-1987).

that "Section 5 of the Voting Rights Act 'has a limited substantive goal: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 477 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (internal citations omitted). Plans can satisfy Section 5's preclearance requirements if they simply preserve "current minority voting strength"; in other words, there is no backsliding. *Id.* (quoting *City of Lockhart v. United States*, 460 U.S. 125, 134, n.10)).

The Court specifically rejected Georgia's claim that a plan should automatically be pre-cleared under Section 5 if it would satisfy Section 2, meaning newly-created districts could not be subject to a successful vote dilution claim. *See id.* at 477-78. In rejecting this argument, the Court reasoned that Section 5 involves a comparison of new and old districting plans, while Section 2 involves claims that "'a certain electoral law, practice or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* at 478 (quoting *Thornburg*, 478 U.S. at 47)). As such, "the two sections 'differ in structure, purpose, and application.'" *Id.* (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994)). The Court flatly refused to "equate" vote dilution under Section 2 with the retrogression analysis of Section 5. *See id.*

This differentiation of the two sections of the VRA comports with Congressional analysis of the Act. Petitioners point out that in amending Section 5 in 2006, Congress stated that retrogression under

that section "should focus exclusively on whether a districting plan will have the effect of diminishing a minority group's 'ability . . . to elect their preferred candidates of choice.'" Pet. Brief, pg. 35; 42 U.S.C. § 1973c(b).

It appears, however, that Congress has clearly distinguished the test under Section 5 from that under Section 2. Senate Report 109-295 from the Senate Judiciary Committee, S. Rep. No. 109-295 (2006), discusses the amendments to Section 5 of the VRA at length. In clarifying the requirements under Section 5, the Committee stated that the amendments abrogated *Ashcroft* in part, as they were meant to "protect naturally occurring districts that have a clear majority of minority voters." S. Rep. No. 109-295, at 8 (2006). The Committee posited that "[i]f a state has a large minority population concentrated in a particular area, ordinary rules of districting . . . would recommend that those voters be given a majority-minority district." *Id.* at 9. In short, this analysis expressly recognized the numerical "majority-minority" approach in redistricting.

In amending the retrogression analysis in Section 5, the Committee extensively discussed adherence to this "majority-minority" approach. It stressed that the VRA is meant to prevent discrimination, not to protect coalitions that seek to elect a certain party candidate. *See id.* The Committee's discussion of retrogression focused on "naturally occurring majority-minority districts," calling the standards laid out in *Ashcroft* "functionally unworkable" because "[t]he concept of 'influence' is vague and the concept of 'coalition'

district is difficult to define." *Id.* In fact, the Committee discussed the potential for *Ashcroft* to "open a door to cracking" or diluting minority voting power by "unpacking" natural majority-minority districts into "influence" or "coalitional" voting districts, thereby spreading out and diluting minority voting power. *Id.* at 10.

Accordingly, the Committee report emphatically states that the 2006 amendments were meant to protect "naturally occurring" and compact majority-minority districts. *See id.* Without the standard, covered jurisdictions under Section 5 of the VRA could facilitate discrimination and dilution by breaking up numerical majorities of minority groups and replacing them "with vague concepts such as influence, coalition, and opportunity." *Id.* The amendments therefore did *not* "protect any district with a representative who gets elected with some minority votes. Rather, [they protect] only districts in which 'such citizens' – minority citizens – are the ones selecting their 'preferred candidate of choice' *with their own voting power,*" not districts in which minorities are "forced to compromise with other groups." *Id.* (emphasis added). The Committee acknowledged that this standard of retrogression, focusing on clear "majority-minority" districts, would not only adhere to the original intent of the VRA, but would "provide predictability to all involved, and reduce wasteful litigation." *Id.*[6]

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[6] In his additional comments, Senator Jon Kyl, R-Ariz., emphatically agreed with this reasoning. He wrote separately to emphasize that Congress cannot require state and local (Continued...)

Therefore, Amici States' conclusion that "it would be illogical to allow courts to consider coalition districts as a defense to § 5 liability but to preclude the use of coalition districts as a remedy for § 2 violations" is not borne out by this legislative history. This Court's adoption of a standard for minority dilution claims should naturally differ from its analysis of whether a state's proposed redistricting plan constitutes "backsliding" by spreading minority groups out further and eliminating previous opportunities to elect their preferred candidates. The amendments to Section 5 in 2006 make clear that such "coalition districts" are *not* protected in the redistricting process, and there is no charge from Congress for states to create or protect such districts. Adoption of the "50% rule" for purposes of Section 2 is therefore in no way inconsistent or in conflict with the retrogression analysis of Section 5 of the VRA.

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governments to retain "districts that do not have a majority of minority voters but that nevertheless reliably support candidates and parties supported by minority voters" because to do so would overstep Congress's bounds to enforce the Equal Protection Clause pursuant to the Fourteenth Amendment. *See id.* at 11 (additional views of Mr. Kyl). If such "influence" and "coalition" districts were protected, Senator Kyle stated that the redistricting process would be distorted to protect party candidates rather than to protect against discrimination, which would be outside of Congress's power under the Fourteenth Amendment. *See id.* Senator Kyle thereby recognized that the VRA is not meant to give any group of voters superior opportunities to other groups, and to apply Section 5 in this way so as to "spread out" minority groups would violate Section 2 of the Act. *See id.*

II. ANY STANDARD BELOW THE "50% RULE" CANNOT BE EFFECTIVELY ADMINISTERED BY THE LEGISLATURE, AND IMPROPERLY INVOLVES COURTS IN REDISTRICTING DECISIONS.

The North Carolina Supreme Court also correctly reasoned that the "50% rule" is "straightforward and easily administered" and thus readily applicable by state legislatures in practice. *Bartlett*, 649 S.E.2d at 373. The court was correct in surmising that the protection of less-than-majority districts would "open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," and as such stronger VRA claims should be protected while promoting judicial economy and providing legislatures with the ability to redistrict without improper judicial second-guessing. *Id.* (citations omitted).

The "50% rule" will reduce the number of cases in which the judiciary must intrude into legislative redistricting decisions. Without a clear, straightforward threshold, courts will increasingly engage in complicated decisions involving potentially conflicting claims of competing minority groups – such as the African American and Cuban populations in Florida. *See, e.g., Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004) (involving an increase of an African American population from 32% to 40% by redrawing district lines to take population from a majority African American district). In other words, competing minority groups such as those in Florida will continuously spar for electoral advantages as the

necessary margin of population dwindles under the first *Gingles* precondition. *Cf. McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) ("Courts might be flooded by the most marginal Section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections.").

A good example of this potential problem in Florida is reflected in the population trends in its most populated area, Miami-Dade County. Many compact, competing minority groups reside in South Florida: African Americans, Cubans, Hispanics from other countries, and a host of other immigrant populations. Forcing the Florida Legislature to choose between competing minority groups in this area is simply unworkable in practice absent a "majority-minority" rule. The Legislature must inevitably make choices under a "coalition district" system that will leave the State open to a host of Section 2 challenges. This does not comport with the language and spirit of the VRA, and it does not square with this Court's reasoning in *Gingles* and its progeny.

A clear, straightforward "50% rule" greatly reduces the instances where the judiciary must get involved in fights over the drawing of district lines, which is an inherently political act. These redistricting decisions generally should be left to legislatures. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (holding that "[t]he task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in

legitimate districting policies."); *see also Bartlett*, 649 S.E.2d at 373 (holding that redistricting is a legislative function, and reasoning that without the "50% rule," "each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that district must be configured in order to give it control over the election of candidates.").

The Amici States assert that members of this Court have proposed a rule that would require "'that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary or dominant party.'" Amici States' Brief, pg. 30 (quoting *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2648 (2006) (Souter, J., concurring in part and dissenting in part)). However, by urging recognition of "coalition districts" as protected from vote dilution under Section 2, Petitioners and the Amici States are essentially asking this Court to protect the opportunities of *political parties* to potentially elect their candidates of choice, as opposed to protecting *minority groups* from discrimination. It is the latter, not the former, that is the subject of the Voting Rights Act.

As the Senate Judiciary Committee recognized in discussing the amendments to Section 5 of the Act in 2006, the VRA protects against discrimination; it does not require legislatures to protect coalitions that seek to elect a certain party candidate. *See* S. Rep. No. 109-295, at 8 (2006). In fact, protection for anything other than "naturally occurring majority-minority districts" under the VRA would be

"functionally unworkable" because "[t]he concept of 'influence' is vague *and the concept of 'coalition' district is difficult to define.*" *Id.* at 9 (emphasis added). The Committee accordingly recognized the fallacy of requiring covered jurisdictions such as Florida to break up numerical majorities of minority groups and replace those districts with districts encompassing "vague concepts such as influence, coalition, and opportunity." *Id.* at 10. Instead, by focusing on numerical "majority-minority" districts, Congress meant to "provide predictability to all involved, and reduce wasteful litigation." *Id.*

Petitioners argue that the recognition of coalition districts could be judicially manageable, and at the same time, adherence to a "50% rule" presents its own enforcement problems because census data regarding voting-age population is inevitably inaccurate. Pet. Brief, pp. 41-42. What this contention fails to recognize, however, is that census data is often the only fixed, objective data available on minority populations when redistricting occurs. States do not possess the kind of data that could be called "coalition data" – i.e., data on political party voting patterns in a given area – when they engage in drawing districts. In any event, this subjective data is *not* the kind of information that should be of concern to a legislature when it is re-districting in conformance with the VRA. Instead, legislatures should be concerned with relatively fixed, objective census data that can be relied upon in determining where compact, naturally-occurring minority populations are located.

Moreover, requiring legislatures to protect "coalition districts" could actually require states to break up or "crack" naturally occurring majority-minority districts, leading to a spreading out and dilution of natural minority voting power. *See id.* This result certainly flies in the face of the intent of the VRA, and it undermines the Petitioner and Amici States' contentions that Congress meant to protect "coalition districts" (as opposed to "influence districts") in amending Section 5 of the Act. *See id.*; *see also* Br. for the U.S. as Amicus Curiae at 23, *League of United Latin American Citizens, et al. v. Perry* (Nos. 05-204, 05-276, and 05-439) ("If Section 2 prevented legislatures from redrawing districts in which minorities constituted only a small fraction of voters, then race could become a predominant factor in a great many redistricting decisions."). The "50% rule" is the standard that can be properly administered by legislatures.

III. ADHERENCE TO THE "50% RULE" COMPORTS WITH PRINCIPLES OF EQUAL PROTECTION.

Finally, Amici States' argument that recognizing "coalition districts" is the only way to make the VRA comport with the Equal Protection Clause misses the point. As the Act makes clear and this Court discussed in *Gingles*, the purpose of the VRA is to prevent discrimination by protecting naturally occurring, compact majority-minority districts from being diluted through redistricting, thereby negating any opportunity for minority groups to elect their preferred candidate. By protecting "coalition districts," this Court would be

sanctioning dilution, watering down the purpose and effect of the VRA.

Petitioners argue that adherence to the "50% rule" encourages the "packing" of minority groups into isolated districts, thereby reducing incentives to form coalitions and allowing states to "pack as many minority voters as possible into a district that is already a safe majority-minority district," resulting in the elimination of minority voting power in surrounding coalition districts. Pet. Brief, pp. 37-39. This argument fails to recognize that Section 2 deals only with claims of vote dilution. Adhering to a "50% rule" as a threshold to state a Section 2 claim does not discourage the formation of coalitions between groups to elect their preferred candidate; nor does it sanction the intentional "packing" of minority groups into districts where they are not naturally located or the fragmentation of naturally occurring groups into multiple districts where they would not form a numerical majority.

Instead, adhering to a "50% rule," recognizing that states must pay attention to those naturally occurring, compact minority districts or face dilution claims, squares with the limited purpose and intent of the VRA. It does not run afoul of equal protection principles, but in fact prevents dilution of minority voting power by protecting against the *"unpacking"* of natural majority-minority districts. *See* S. Rep. No. 109-295, at 10 (discussing Section 5 of the VRA); *see also id.* at 11 (additional comments of Senator Jon Kyl, R-Ariz., reasoning that Congress *cannot require* state and local governments to retain districts that do not have a majority of minority

voters under Section 5 of the VRA, because to do so would go beyond Congress's powers to enforce equal protection guarantees pursuant to the Fourteenth Amendment by protecting political parties rather than combating discrimination). The threshold adopted by the North Carolina Supreme Court therefore comports with both the VRA and equal protection guarantees against discrimination.

CONCLUSION

For all of the above reasons, this Court should affirm the North Carolina Supreme Court and hold that when a racial minority group constitutes less than 50% of a proposed district's population, there can be no vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Respectfully submitted,

Jeremiah M. Hawkes
General Counsel
Carlos G. Muñiz
Special Counsel
Florida House
of Representatives
422 The Capitol
Tallahassee, FL 32399
(850) 488-7631

BILL MCCOLLUM
Attorney General
Scott D. Makar*
Solicitor General
Craig D. Feiser
Deputy Solicitor
General
State of Florida
Office of the
Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300
(850) 410-2672 (fax)
Counsel of Record

AMICUS CURIAE BRIEF

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No. 07-689

In the Supreme Court of the United States

GARY BARTLETT, ET AL., PETITIONERS,

v.

DWIGHT STRICKLAND, ET AL., RESPONDENTS.

On Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR THE STATES OF ILLINOIS, ARIZONA, CALIFORNIA, CONNECTICUT, GEORGIA, KANSAS, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEW JERSEY, NEW MEXICO, AND OHIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

[additional counsel listed on signature page]

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QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a minority group must constitute an arithmetic majority in a single-member district to state a claim under § 2 of the Voting Rights Act ("Act"), or whether it is sufficient that the minority group—although comprising less than 50% of the district's population—is effectively the majority because it has a realistic opportunity to elect its preferred candidates as a result of reliable white crossover voting.

Amici States have a critical interest in this matter. Every ten years, based on the results of the decennial census, state and local legislatures redraw district lines to comply with the Equal Protection Clause and § 2's prohibition against vote dilution. Whether § 2 permits, or requires, less-than-50% minority, coalition districts has a significant impact on how legislatures draw district lines.

If, as the North Carolina Supreme Court concluded below, § 2 protections are limited by a rigid numerical majority requirement, state legislatures will need to adopt a formalistic approach to redistricting that ignores political realities. *Amici* States believe that application of this so-called "50% rule" is contrary to the text and history of § 2 and this Court's precedents, and, moreover, will serve neither legislative bodies nor the voters they represent, for the rule perpetuates racial balkanization and prevents historically disempowered groups from exercising their fair share of political power.

STATEMENT

1. Members of the North Carolina House of Representatives ("House") are elected from single-member districts and serve two-year terms. Pet. App. 58a. In 1982, using the results of the 1980 census, the North Carolina General Assembly ("General Assembly") enacted a redistricting plan that divided Pender County between two districts. *Id.* at 60a. This plan was in effect for all House elections from 1982 through 1990. *Ibid.*

2. In 1992, the General Assembly undertook redistricting based on the results of the 1990 census. The resulting plan, which was in effect from 1992 through 2000, divided Pender County among three districts. *Id.* at 61a. One of the districts (District 98) was drawn on the insistence of the United States Department of Justice ("USDOJ") that minority voting strength was not being sufficiently recognized in southeastern North Carolina. *Id.* at 64a-65a.[1]

3. At the time of the 1990 census, District 98 had an African-American population of 59.26% and an African-American voting-age population of 55.72%. *Id.* at 61a. By the 2000 census, however, these figures had declined to 50.70% and 47.07%, respectively. *Ibid.* At the same time, 62.53% of the district's registered voters were Democrats, 53.37% of whom were African-American. *Ibid.* Because a majority of registered

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[1] North Carolina must submit its redistricting plans to the USDOJ for approval because certain of its counties are subject to the federal "preclearance" requirement in § 5 of the Act. Pet. App. 63a; see also *infra* p. 24 n.6.

voters were Democrats and a majority of Democrats were African-Americans, the candidate preferred by African-American voters had the best chance of winning the House seat in District 98—by prevailing in the Democratic primary and then, as a result of crossover votes from white Democrats, by winning the general election. *Id.* at 61a-62a. Indeed, Representative Thomas Wright, a Democrat and an African-American, was elected to represent District 98 from 1992 through 2000. *Id.* at 61a.

4. Using the results of the 2000 census, the General Assembly again undertook redistricting, resulting in the "2003 plan," which divided Pender County between two districts, District 16 and District 18. *Id.* at 69a.[2] District 18, home to Representative Wright, has an African-American population of 42.89% and an African-American voting-age population of 39.36% but a Democratic population of 59.01% (of registered voters), 53.72% of whom are African-American. *Id.* at 69a-70a. In the 2004 elections, Representative Wright won re-election. *Id.* at 70a.

5. In 2004, respondents brought this lawsuit, alleging that the division of Pender County into two

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[2] Because the General Assembly's initial redistricting plan failed to garner judicial approval, the 2002 elections were held pursuant to a judicially crafted interim plan. Pet. App. 60a. Representative Wright was elected to represent interim District 18, which had an African-American population of 46.99% and an African-American voting-age population of 43.44% but a Democratic population of 64.31% (of registered voters), 52.58% of whom were African-American. *Id.* at 68a.

districts violated the "Whole County Provisions" ("WCP") of the North Carolina Constitution, *id.* at 6a, which provide that "[n]o county shall be divided" in the formation of legislative districts, N.C. Const. art. II, §§ 3(3), 5(3). Previously, the North Carolina Supreme Court had applied the WCP to hold that county lines may be cut to comply with federal law, so long as they are cut no more than federal law requires. Pet. App. 3a. In the current litigation, a three-judge panel of North Carolina's Superior Court unanimously rejected respondents' claims, holding that § 2 of the Act mandated District 18 and that the WCP therefore did not preclude the division of Pender County. *Id.* at 116a-117a.

6. The panel acknowledged that the General Assembly drew District 18 as a "preemptive strike" against the likelihood that, if an effective minority district is not maintained in southeastern North Carolina, a lawsuit would allege impermissible vote dilution. *Id.* at 90a. Without dividing Pender County, the maximum African-American voting-age population achievable within a single district would not have been enough to ensure African-American voters a realistic opportunity to elect their preferred candidate. J.A. 73.

The panel then addressed the three preconditions to a § 2 claim set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986)—that (1) the minority group is "'sufficiently large and geographically compact to constitute a majority in a single member district,'" (2) the minority group is "'politically cohesive,'" and (3) "'the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate.'" Pet. App. 77a (quoting *Gingles*, 478 U.S. at 50-51).

Focusing on the first precondition, the panel rejected respondents' proposed, "bright-line" rule, which would require a minority group to form an absolute numerical majority to state a § 2 claim. Pet. App. 90a-93a. Instead,"[a]s a matter of practical common sense," the court held that the "inquiry must focus on the *potential of black voters to elect representatives of their own choosing* not merely on sheer numbers alone." *Id.* at 93a (emphasis in original). Thus, satisfaction of the first *Gingles* precondition depends on "whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single-member district operate to make the black voters a *de facto* majority that can elect candidates of their own choosing." *Ibid.*

Applying this approach, the panel concluded that African-Americans did constitute a *de facto* majority in District 18. *Id.* at 97a-99a. As the panel explained, "[i]n North Carolina, a *more important indicator of effective black voting strength* [than sheer numbers of African-Americans, or African-Americans of voting age] *is the percentage of registered Democrats who are black.*" *Id.* at 97a (emphasis in original). Moreover, relying on an analysis of past election results, the court determined that districts with an African-American voting-age population of 37.81% or greater—like District 18—will provide an effective opportunity for the election of candidates preferred by African-American voters. *Ibid.* Based on these findings, the panel concluded that District 18 satisfied the first two *Gingles* preconditions as a matter of law. *Id.* at 99a-100a. After the parties stipulated to the satisfaction of the third *Gingles* factor, the panel granted summary

judgment for petitioners on its finding that, based on the totality of the circumstances, the creation of District 18 was required by § 2. *Id.* at 112a-116a.

7. In a divided opinion, the North Carolina Supreme Court reversed. Although the majority recognized that, as a result of support from white voters who reliably cross over racial lines, African-Americans in District 18 had the effective ability to elect their preferred candidates, *id.* at 5a, the court nevertheless held that § 2 did not require District 18 because African-Americans did not comprise 50% of the district's eligible voters, *id.* at 19a-27a. In reaching this conclusion, the majority reasoned that *Gingles* requires an actual numerical majority, and that such a rule would be "logical" and "readily applicable in practice." *Id.* at 19a-20a. The majority acknowledged that its holding could "foreclose" "meritorious claim[s]," but asserted that such "sacrifice[]" was necessary to avoid "open[ing] a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes" and to obtain the benefits of a "bright line rule," including a "safe harbor" for legislatures in the redistricting process. *Id.* at 24a (internal punctuation and quotation omitted).

By contrast, the dissenting justices relied on the plain language of § 2, specifically its requirement that courts consider "'the totality of the circumstances.'" *Id.* at 48a (quoting 42 U.S.C. § 1973). According to the dissent, this language favors a "flexible standard based on political realities" rather than a rigid numerical majority requirement. *Ibid.* The dissent also noted that this Court had "repeatedly declined to close the door" to § 2 relief under the circumstances of this case

and, moreover, "caution[ed] lower courts against applying *Gingles* to impose a rigid numerical majority requirement." *Id.* at 41a-42a. Finally, the dissent questioned the majority's view that a strict, 50% rule was necessary for administrative ease. Past election results in North Carolina demonstrate that African-American Democratic voter registration is "the most relevant indicator of black voting strength," and, indeed, "districts where such registration exceeds fifty percent consistently elect black representatives." *Id.* at 46a. Justice Timmons-Goodson wrote separately to note the majority's "insufficient deference to the legislature's considered judgment." *Id.* at 50a.

SUMMARY OF THE ARGUMENT

The North Carolina Supreme Court adopted a rigid "50% rule," which appears nowhere in § 2, based on its belief that, although its approach to vote dilution might "foreclose" "meritorious claim[s]," this Court's ruling in *Gingles* compelled it, and it would be "logical" and "readily applicable in practice." Pet. App. 19a-20a, 24a. The court's decision fails on numerous grounds.

First, the court ignored the plain language and legislative history of § 2, which require courts to adopt a functional view of the political process and consider the totality of the circumstances when evaluating vote dilution claims. Had the court considered existing political realities as it was required to do, it would have recognized that minority voters are able to elect their preferred candidates from districts in which they constitute less than a majority as a result of reliable white crossover voting, and the court would have held that such "coalition" districts are entitled to § 2 protections.

The North Carolina Supreme Court also either misapplied or ignored controlling decisions from this Court. Far from requiring an arithmetic majority in all cases, *Gingles* and its progeny expressly reserved the question whether § 2 protections are limited to majority-minority districts, and (like the language and legislative history of § 2) made clear that the purpose of the preconditions are served by a flexible, fact-specific approach to vote dilution claims. And the court below failed even to mention *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which compels the conclusion that coalition districts qualify for § 2 protections.

In addition, the court erred in speculating about the possibility of marginal § 2 litigation as grounds to deny relief that Congress intended. In any event, there are effective means to weed out unsubstantiated vote dilution claims without relying on a formalistic cutoff, and allowing coalition district claims therefore need not open the floodgates to unwarranted litigation.

Finally, the recognition of coalition district claims will discourage legislatures from unnecessarily drawing majority-minority districts, and thereby bring this Court's § 2 cases in line with the equal protection prohibition on the use of race as the dominant consideration in redistricting decisions. And by favoring integrated coalition districts over majority-minority districts, the rejection of the 50% rule will further the Act's overarching goal of hastening our transformation to a race-neutral political system.

ARGUMENT

The North Carolina Supreme Court made multiple, fundamental errors when it limited § 2 protections to districts where minorities make up 50% or more of the voting-age population. The court's ruling is at odds with the language and purposes of the Act, with *Gingles* and more recent decisions—including *Georgia v. Ashcroft*—and with equal protection guarantees and well-recognized policy. For each of these reasons, this Court should reverse the judgment below and hold that § 2 protects all districts in which minority populations reliably select their candidates of choice.

I. On Its Face, § 2 Precludes An Absolute Numerical Majority Requirement.

This case presents a question of statutory interpretation: whether § 2 bars vote dilution claims in single-member districts where a minority group does not constitute more than 50% of the population. The Court's "task is to construe what Congress has enacted," *Duncan v. Walker*, 533 U.S. 167, 172 (2001), an analysis that "begins with the language of the statute," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations and internal quotation marks omitted). "And where the statutory language is clear," the analysis "ends there as well." *Ibid.* (citations and internal quotation marks omitted); accord, *e.g.*, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (citations and internal quotation marks omitted). Critically, as to the question presented here, the language of § 2 demonstrates that Congress did not

intend to erect strict numerical limits on its protections.

Section 2(a) prohibits any electoral practice or procedure that "results in the denial or abridgement of the right * * * to vote on account of race or color * * * ." 42 U.S.C. § 1973(a). Section 2(b), in relevant part, specifies that § 2(a) is violated if "based on the totality of the circumstances," it is shown that "the political processes leading to the nomination or election" of candidates are not "equally open to participation by" minority voters, such that minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1972(b).

Thus, § 2 requires courts to consider the "totality of the circumstances" when evaluating vote dilution claims. This requirement alone forecloses the North Carolina Supreme Court's rigid, single-factor limitation on § 2 coverage. In addition, § 2 protects minorities' opportunity not only to vote, but more broadly to participate in "the political processes leading to the nomination and election of candidates." This language demonstrates Congress' intent to protect conduct beyond voting, such as the building of coalitions that will determine the outcome of elections. Finally, § 2 condemns practices that impair minority voters' "opportunity * * * to elect" their candidates of choice. The use of the word "elect" precludes any 50% rule, for as election results of the past two decades demonstrate, minority voters in coalition districts can elect their preferred candidates.

Indeed, "the most current social-scientific data" indicates that "black candidates can be elected to office,

despite the presence of significantly polarized voting patterns, in at least some districts * * * where the black voting-age population is 33% to 39% * * *." Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1537-1538 (2002); accord Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 Election L.J. 7, 12 (2002) (after 2000, most African-American and Hispanic members of the New Jersey Legislature were elected from districts that are not majority-minority, and some were elected from districts that are less than 30% minority); Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1397-1398 (2001) (during the 1990s, African-American congressional candidates in Florida, Georgia, North Carolina, Texas, and Virginia prevailed in districts that were not majority African-American); J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 566-568 (1993) (in 1990, African-Americans and Hispanics elected to state and national office from California were elected from districts that were not majority-minority and in some cases were less than 34% minority).

That minority-preferred candidates are elected from districts in which minority voters fall short of a numerical majority reflects the established fact that minority electoral success is a function of more than

raw population percentages. Election results also hinge, for example, on

> the relative weight at which minorities and whites participate in the electoral process, the degree to which minority and white voters support minority-preferred candidates, and the fact that the United States has a multi-stage electoral process that includes a primary election, a general election, and sometimes a run-off election as well.

Grofman, Handley, & Lublin, *supra*, at 1403-1404; accord Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 18 (1993).

Minority electoral success also depends largely on the cohesiveness of majority and minority group voters. This is because "[a]s minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa." Kousser, *supra*, at 563; accord Lichtman & Herbert, *supra*, at 10-11. Thus, where minority voters are highly cohesive and white voters are not, minority groups may elect their preferred candidates with less than 50% of the population.[3] This is especially so in

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[3] The impact of minority- and majority-group cohesiveness on election results is illustrated by the following examples, which assume (for simplicity's sake) that the electorate is divided between two groups, the "majority" and the "minority." If the majority votes wholly as a bloc (that is, is

districts where minority voters command a majority of the dominant political party, and therefore determine who prevails in the primary and, in combination with white voters who vote according to party affiliation, decide who wins the general election. In fact, studies conducted since 1990 indicate that minority voters do tend to vote highly cohesively, and that a reliable bloc of white voters—as much as one-third of the white population—votes consistently on the basis of party affiliation, rather than race, in general elections. See, *e.g.*, Pildes, *supra*, at 1529-1535.

Consider a recent example from Illinois. During redistricting following the 2000 census, the Illinois General Assembly enacted a plan designed to offer African-American voters a realistic opportunity to elect their preferred candidates in 19 districts. In one of these districts (District 78), however, African-Americans made up only 39% of the voting-age population. But as state planners anticipated, African-Americans have been able to elect their preferred candidate from District 78, for African-Americans constitute a majority of Democratic voters in that highly Democratic district. Under the plain language of § 2, federal law both permits and protects districts like this one in future redistricting efforts.

100% cohesive), the minority must constitute at least 50% of the population and be 100% cohesive to have any chance of electing its preferred candidate. See Kousser, *supra*, at 563. If the majority is only 60% cohesive, however, the minority need constitute only 30% of the population and be only 90% cohesive for the minority-preferred candidate to prevail. See *ibid.*

In sum, the North Carolina Supreme Court's decision is impossible to reconcile with § 2's plain language requiring consideration of the totality of the circumstances and ensuring minority populations a full opportunity to participate in the political process and elect their candidates of choice. A single-factor, bright-line rule that narrows minorities' political influence to districts where they constitute an arithmetic majority cannot be squared with this intent. By contrast, the protection of coalition districts effectuates Congress' mandate, because it accounts for existing political realities to authorize the creation of more districts in which minority voters have the opportunity to elect a candidate of choice.

II. Section 2's Legislative History Supports a Functional, Fact-Specific Approach to Vote Dilution Claims.

Even if § 2's language were ambiguous on the question presented and therefore not alone dispositive, its legislative history shows that Congress did not intend to impose a rigid, 50% rule. See, *e.g.*, *Patterson v. Shumate*, 504 U.S. 753, 761 (1992) ("courts 'appropriately may refer to a statute's legislative history to resolve statutory ambiguity'") (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)); see also *Gingles*, 478 U.S. at 43-46 (using legislative history to interpret § 2).

The Senate Report ("Report") accompanying the Act's 1982 amendments is Congress' "statement for the record of the intended meaning and operation of" the amended Act and its definitive legislative history. S. Rep. No. 97-417, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 178; see also *Gingles*, 478 U.S. at 43

(the Report "elaborates on the nature of § 2 violations and on the proof required to establish these violations"). The Report confirms that Congress intended courts to undertake a functional review of § 2 claims, and to focus their analysis on the totality of the circumstances rather than the presence or absence of a single factor.

In the Report, Congress eschews "formalistic" standards and "mechanistic rules." S. Rep. No. 97-417, at 30 n.120, 31, reprinted in 1982 U.S.C.C.A.N., at 208. Instead, to "formulat[e] remedies in cases which necessarily depend upon widely varied proof and local circumstances," the Report requires § 2 claims to be "carefully and meticulously scrutinized" and decided in light of "all the circumstances in the jurisdiction in question." *Id.* at 19, 27, 31, reprinted in 1982 U.S.C.C.A.N., at 196, 205, 208 (internal quotation marks omitted). This analysis must involve "a searching practical evaluation of the past and present reality" and "a functional view of [the] political process." *Id.* at 30 & n.120, reprinted in 1982 U.S.C.C.A.N., at 208 (internal quotation marks omitted). The Report's flexible, fact-specific approach to § 2 claims is impossible to square with a 50% rule, or with any single-factor, numerical cutoff for that matter.

Equally telling, while the Report noted a number of "[t]ypical factors" that might be probative of a § 2 violation, S. Rep. No. 97-417, at 28, reprinted in 1982 U.S.C.C.A.N., at 206, the presence or absence of an arithmetic majority is not among them. True to the Report's all-in, case-by-case approach, moreover, not even the *listed* factors are dispositive, for "there is no

requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29, reprinted in 1982 U.S.C.C.A.N., at 207.

In short, the legislative history only reinforces what the language of § 2 already makes plain—that courts must evaluate § 2 claims practically and in light of surrounding circumstances. Once again, § 2 is simply incompatible with the North Carolina Supreme Court's rigid deference to a single criterion that (by the court's own admission) "foreclose[s]" "meritorious claim[s]." Pet. App. 24a.

III. A Rigid, 50% Rule Is Irreconcilable With This Court's Voting Rights Decisions.

The North Carolina Supreme Court did not purport to follow the language of § 2 or its legislative history, but instead grounded its 50% rule on the three "preconditions" for proving vote dilution this Court set forth in *Thornburg v. Gingles*—specifically, that the minority group demonstrate "that it is sufficiently large and geographically compact to constitute a majority in a single-member district;" "that it is politically cohesive;" and "that the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50.[4]

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[4] Vote dilution challenges can arise in "single-member" or "multimember" legislative districts. In a single-member district, which "is the smallest political unit from which representatives are elected," one legislator is elected to represent voters in the district. *Gingles*, 478 U.S. at 50 n.17. By contrast, in multimember districts, "two or more legislators [are] elected at large by the voters of the

In particular, the North Carolina Supreme Court latched onto the word "majority" in the first precondition—which it took as a command to require "a numerical majority"—as well as a perceived tension between the first and third preconditions absent a 50% rule. Pet. App. 20a, 25a-26a. The court's approach to *Gingles* fails for at least three reasons: (1) on its face, *Gingles* does not require an arithmetic majority; (2) the reasons the Court gave for the *Gingles* factors are incompatible with a 50% rule; and (3) this Court's subsequent decision in *Georgia v. Ashcroft* counsels powerfully against the state court's reading of *Gingles*.

A. *Gingles* Does Not Require An Arithmetic Majority.

Contrary to the North Carolina Supreme Court's ruling, *Gingles* does not limit application of § 2 to districts with an arithmetic majority of minority voters. In fact, in *Gingles*, the Court expressly declined to address "whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12. Since *Gingles*, moreover, the Court has presumed that § 2 does permit such claims. See *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594, 2624 (2006)

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district." *Whitcomb v. Chavis*, 403 U.S. 124, 127-128 (1971). Although *Gingles* arose in the context of a multi-member district, the Court subsequently made clear that the *Gingles* analysis applies equally to single-member districts. See, *e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

(Kennedy, J., writing for the plurality) (assuming without deciding that minority group may state a § 2 claim if its members "constitute a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes") (citation and internal quotations omitted); *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994) ("assum[ing] without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases"); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming without deciding that a § 2 claim may be based on allegations "not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original).[5]

Not only has this Court consistently acknowledged that § 2 may permit coalition district claims, but individual members of the Court have made clear that § 2 does permit such claims. In *Gingles* itself, four members of the Court would have held that § 2 may

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[5] In *Growe*, the Court reserved judgment on whether dilution of a minority group's "ability to influence, rather than alter, election results" could violate § 2. 507 U.S. at 41 n.5. That question is not at issue in this case. However, since "influence" district claims are easier to establish than coalition district claims, *Growe* necessarily left open the possibility that coalition district claims are cognizable.

afford relief under such circumstances, on the ground that if a minority group

> can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

478 U.S. at 89 n.1 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment). More recently, in *LULAC*, three members of the Court agreed that a minority group might satisfy the *Gingles* preconditions in ways other than with a numerical majority. See 126 S. Ct. at 2647-2650 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part).

B. A Flexible, Fact-Specific Approach To Vote Dilution Claims Furthers The Purpose Of The *Gingles* Preconditions.

The rejection of the 50% rule already endorsed by several members of the Court is consistent with *Gingles*, wherein the Court relied on § 2 and the Report to conclude that Congress intended the vote dilution inquiry to be "a flexible, fact-intensive test." 478 U.S. at 46. Accordingly, *Gingles* admonished lower courts to engage in "an intensely local appraisal" and a "searching practical evaluation of the past and present reality," *id.* at 79, as they undertake a "functional

analysis" of vote dilution claims, *id.* at 62 (internal quotation marks and citation omitted).

To be sure, as the North Carolina Supreme Court noted, *Gingles* used the word "majority" in the first precondition, which out of context might suggest that it is impossible to violate § 2 unless a majority-minority district can be created. But *Gingles* immediately explained the purely functional meaning behind its "majority" requirement: because minority voters "cannot claim to have been injured by [a challenged] practice or structure" if their preferred candidate cannot prevail even in its absence, the first precondition is necessary to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged practice or structure." 478 U.S. at 59 n.17 (emphasis in original). Thus, the purpose of the first precondition is simply to assure that there is a causal relationship between the challenged redistricting decision and harm to minority voters. As the Court has recognized, "'the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice,'" that is, an effective but not necessarily an arithmetic majority of minority voters. *LULAC*, 126 S. Ct. at 2616 (Kennedy, J., writing for the plurality) (quoting *De Grandy*, 512 U.S. at 1008).

The North Carolina Supreme Court also believed that its interpretation of the first *Gingles* precondition was compelled by the language of the third precondition—that is, the required showing that the majority votes "'sufficiently as a bloc to enable it * * *

usually to defeat the minority's preferred candidate'"—which the state court described as being in "tension" with any recognition of protected status for coalition districts. Pet. App. 25a-26a (quoting *Gingles*, 478 U.S. at 51). To the contrary, in *Gingles*, the Court warned that "there is no simple doctrinal test for the existence of legally significant racial bloc voting," and, after specifically considering crossover voting, found prong three satisfied as long as "a white block vote * * * normally will defeat the combined strength of minority support *plus* white 'crossover' votes." 478 U.S. at 56, 58 (emphasis added); see also *Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) ("*Gingles* doesn't require an absolute monolith in the Anglo * * * vote and recognizes the existence and role of white crossover voting."); *Jenkins v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir. 1993) ("*Gingles* does not require a showing that white voters vote as an unbending monolithic block against whomever happens to be the minority's preferred candidate" to state a claim under § 2). In other words, under *Gingles*, it is possible for there to be white crossover voting that is insufficiently substantial to defeat an assertion of white bloc voting but is nevertheless significant enough to establish a minority group's potential to elect its preferred candidates under the first precondition.

In any event, even if *Gingles* did intend to establish an arithmetic majority requirement under the circumstances at issue, "*Gingles* was directed to a particular practice—multi-member districts," and, accordingly, its preconditions may not be strictly applicable to challenges to single-member districts. *Metts v. Murphy*, 363 F.3d 8, 10 (1st Cir. 2004) (*en*

banc); see also *ibid.* (*Gingles* "did not purport to offer a general or exclusive gloss on section 2 for all situations"). This Court has emphasized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim," *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 158, and, tellingly, has consistently avoided applying an inflexible 50% requirement to challenges to single-member districts, see *LULAC*, 126 S. Ct. at 2624 (Kennedy, J., writing for the plurality) (assuming the preconditions are satisfied where minority group did not comprise an arithmetic majority); *De Grandy*, 512 U.S. at 1009 (same); *Voinovich*, 507 U.S. at 158 (same); *Growe*, 507 U.S. at 41 (same). Indeed, in *Voinovich*, the Court openly anticipated the possibility that the preconditions might be altered in certain cases, including where the failure to draw a coalition district is alleged. There, the Court assumed without deciding that § 2 contemplates claims premised on allegations "not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority," and acknowledged that the first *Gingles* precondition could be "modified or eliminated when analyzing [such a claim]." 507 U.S. at 158 (emphasis in original); see also *LULAC*, 126 S. Ct. at 2651 n.8 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.").

Finally, assuming *Gingles* intended a 50% rule, that requirement would have been based on a specific,

time-bound view of minority electoral opportunity that is no longer relevant. See *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988) (a majority-minority requirement would have been "based * * * on a plausible scenario under which courts can estimate approximately the ability of minorities in single-member districts to elect their candidates of choice"). In particular, during the 1970s and 1980s, minority voters were not only rarely able to elect representatives of their choice without constituting at least a majority in an electoral district, but the conventional wisdom was that to overcome then-prevalent voting patterns, the total minority population needed to be at least 65%. See *Ketchum v. Byrne*, 740 F.2d 1398, 1415-1416 (7th Cir. 1984) (collecting sources); see also Luke P. McLoughlin, Note, Gingles *in Limbo: Coalitional Districts, Party Primaries, and Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 324 (2005) ("In voting rights cases following *Gingles*, a supermajority was often necessary to ensure an equal chance of electing a candidate due to differing levels of voter registration, citizenship, age, and turnout amongst minority and white populations."). Due in part to increased white crossover voting, however, the percentage of minority population necessary to elect a candidate has been steadily declining and is well below 50%. See *supra* pp. 11-13. Thus, "the specific contextual reasons the Court gave for requiring safe districts in the typical case in the 1980s" no longer apply. Pildes, *supra*, at 1554.

C. The Court's Rejection Of The 50% Rule In The § 5 Context Counsels Against Applying The Rule To § 2 Claims.

Not only did the North Carolina Supreme Court erroneously rely on *Gingles* as support for its arithmetic majority requirement, but the court failed even to consider *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which members of this Court have called "[c]hief among the reasons" for rejecting the 50% rule. *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).[6] In *Ashcroft*, this Court observed that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts," and, accordingly, held that, when assessing retrogression for § 5 purposes, courts must consider not only majority-minority districts but also districts in which minority voters comprise a substantial minority. 539 U.S. at 482-483. Notably, the Court was unanimous that coalition districts should be considered in the § 5 analysis; the dissent objected only to the use of influence districts in which it was not clear that minority voters would have the ability to elect even

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[6] *Ashcroft* addressed § 5 of the Act, which requires jurisdictions with a history of racially discriminatory voting practices to preclear redistricting plans with the USDOJ (or the federal district court in Washington, D.C.). Pet. App. 123a-125a. Proposed changes will receive federal preclearance only if they will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

with crossover support. See *id.* at 492-494 (Souter, J., dissenting).[7]

Although the Court in *Ashcroft* cautioned that § 2 and § 5 "'combat different evils'" and "'impose very different duties upon the States,'" the Court also recognized that "some parts of the § 2 analysis may overlap with the § 5 inquiry." 539 U.S. at 478 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)); see also *Chisom v. Roemer*, 501 U.S. 380, 401 (1991) (noting "close connection" between §§ 2 and 5). Thus, the Court's rejection of the 50% rule in the § 5 context also has significance in the § 2 context. See *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003) ("*Georgia v. Ashcroft* supports our conclusion that [ability-to-elect] claims are permitted" under § 2).

In particular, the Court acknowledged that minority voters can elect their chosen candidates even if they do not comprise an arithmetic majority within a single district. See *Ashcroft*, 539 U.S. at 480 ("'[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority

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[7] In 2006, Congress amended the Act to overrule *Ashcroft* insofar as it made consideration of influence districts a proper part of the retrogression inquiry. See 42 U.S.C. § 1973c(b) (§5 inquiry shall consider whether a redistricting plan will diminish minority voters "ability" not merely to influence an election, but actually "to elect their preferred candidates of choice"). Notably, the 2006 amendments do not alter—and, in fact, they endorse—*Ashcroft*'s unanimous recognition of coalition districts in the § 5 context. See *ibid.*

within a single district in order to elect candidates of their choice.'") (quoting *De Grandy*, 512 U.S. at 1020) (brackets in original). The dissent agreed. See *id.* at 492 (Souter, J., dissenting). The Court also emphasized the fact-bound nature of claims under the Act, holding that the retrogression inquiry under § 5, like the dilution inquiry under § 2, requires an assessment of the "totality of the circumstances," including "the ability of minority voters to elect their candidate of choice" and "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479. Finally, the Court held that courts are capable of engaging in the fact-intensive analysis required to determine whether a minority group comprises an effective majority—without resort to a "'single statistic'" as an arbitrary numerical cutoff. *Id.* at 480 (quoting *De Grandy*, 512 U.S. at 1020-1021). Here, again, the dissent was in agreement. See *id.* at 492 (Souter, J., dissenting).

Moreover, it would be illogical to allow courts to consider coalition districts as a defense to § 5 liability but to preclude the use of coalition districts as a remedy for § 2 violations. Both provisions aim to ensure that minority voters with the potential "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), have an equal opportunity to do so. It would be an odd legal scheme that considered coalition districts critical to minority voting power for purposes of retrogression, but *per se* immaterial under § 2. Put differently, "it would make little sense" for courts to preclear a redistricting plan that divides one majority-minority district into two coalition districts in a § 5 jurisdiction, but then, in a noncovered jurisdiction, reject a

redistricting plan that creates two coalition districts rather than one majority-minority district. Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2602 (2004).

IV. Recognizing Coalition District Claims Will Not Open The Floodgates To Marginal § 2 Litigation.

The North Carolina Supreme Court also supposed that the 50% rule is "straightforward and easily administered" and thus "more readily applicable in practice." Pet. App. 19a-20a, 24a. The court suggested that recognition of coalition districts would "open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," and, although the court acknowledged that adoption of the 50% rule "might conceivably foreclose * * * meritorious claim[s]," it nevertheless deemed this a "justifiabl[e] sacrifice[] * * * to protect stronger claims and promote judicial economy" and to provide legislatures with the benefits of a "safe harbor in the redistricting process." *Id.* at 24a (internal quotation marks and citation omitted). This reasoning fails for multiple reasons.

First, given the fundamental nature of the right to vote, even a legitimate need for judicial ease and economy does not justify denying relief where there is real injury. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); see also Kousser, *supra*, at 568. This is particularly true given the absurd and harsh results the 50% rule produces. The rule relies

wholly on "census results that are but a snapshot in time (invariably outdated by the time litigation is completed) and are infected by the now well-established undercounting of minority peoples," Lichtman & Hebert, *supra*, at 18-19, as well as other inaccuracies. In particular, the 2000 census counted college students, military personnel, and nursing home patients as being residents of where they were living on April 1, 2000, even though they were registered to vote in another district. This creates discrepancies between the census results and the districts' actual minority and majority populations.[8] In addition, the rule has the effect of foreclosing § 2 claims merely because minority voters, although plainly constituting an effective majority, are marginally less than a numerical majority—such as 49.9%—of the relevant

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[8] For example, the inclusion of military personnel—who generally are not registered to vote (or even eligible to vote) in the district in which they are counted for census purposes—has a substantial effect on the calculation of a district's minority population as a percentage of its total population. Using the results of the 2000 census, the African-American voting-age population in Georgia's Senate District 15 is 49.6%; that percentage increases to 51.6% when the population of Fort Benning is removed from the district. Similarly, the Latino voting-age population in Arizona Senate District 24 is 49% based on the census results but 50.1% when Yuma Marine Corp Air Station is excluded. Finally, in North Carolina, the African-American voting-age population of House District 12 is 47% based on the census but 52% without Cherry Point Air Station, while the African-American voting-age population of House District 43 is 47% based on the census but 59% without Fort Bragg.

district. See McLoughlin, *supra*, at 325 (collecting cases).

It was for this very reason that the Court in *De Grandy* refused to adopt a bright-line rule even though it would have provided certainty and administrative ease. The Court rejected a proposal that, as a matter of law, no § 2 violation may be found in cases where the number of single-member districts in which minority voters form an effective majority mirrors the minority's share of the relevant population. See 512 U.S. at 1017-1020. The Court acknowledged that such a rule would provide the benefits of a "safe harbor" for States and other redistricting bodies, but nevertheless held that "[t]he safety would be in derogation of the statutory text and its considered purposes," specifically, "the textual command of § 2[] that the presence or absence of a violation be assessed based on the totality of the circumstances." *Id.* at 1018 (internal quotation marks and citation omitted). Thus, the Court emphasized,"[n]o single statistic provides courts with a shortcut to determine whether" § 2 has been violated. *Id.* at 1020-1021.

Second, contrary to the North Carolina Supreme Court's unsupported presumption, allowing minority voters to assert coalition district claims will not inundate the courts with marginal § 2 filings. Plaintiffs still must plead and prove facts establishing a minority population's ability to elect candidates of its choice with the help of reliable crossover votes, not to mention plaintiffs' need to satisfy the second and third *Gingles* preconditions and the totality of the circumstances factors. See McLoughlin, *supra*, at 344 ("the best way to permit coalitional district section 2

claims and retain *Gingles*'s triage function is for courts to rely on the latter two *Gingles* prongs to filter vote dilution claims for the bulk of section 2 cases"). Unsubstantiated vote dilution claims may easily be rejected on any of these grounds, without reliance on a formalistic numerical cutoff.

Finally, to the extent the court below was legitimately concerned about obtaining a workable standard for vote dilution claims, a 50% rule is not the best—much less the only—way to achieve this goal. Members of this Court have proposed an alternate, equally "clear-edged" rule: a requirement "that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party." *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part). This limiting principle flows from the settled proposition that "a dominant party's primary can determine the representative ultimately elected." *Id.* at 2649 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); see also *supra* pp. 12-13. Other limiting principles also are available. See *LULAC*, 126 S. Ct. at 2648 n.3 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) (declining to "rule out other circumstances in which a coalition district might be required by § 2"). For example, courts concerned about marginal vote dilution claims might ask whether the number of majority-minority districts, in combination with any coalition districts, meets the "rough proportionality" standard this Court has identified as an indicator of § 2 compliance. *De Grandy*, 512 U.S. at 1023; see also Note, *supra*, at 2609-2610.

V. Recognizing Coalition District Claims Accords With The Court's Equal Protection Jurisprudence And Public Policy.

In a series of decisions beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), this Court held that voters in the majority group may challenge a redistricting plan as a violation of the Equal Protection Clause if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). If race is the dominant and controlling consideration, the redistricting decision will survive only if it is narrowly tailored to achieve a compelling governmental interest. See, *e.g.*, *Miller*, 515 U.S. at 920; *Shaw*, 509 U.S. at 658.

There is a clear tension between the equal protection line of cases and the approach to § 2 adopted by the North Carolina Supreme Court. This is because disallowing coalition districts encourages legislatures to draw majority-minority districts whenever possible, in which case equal protection principles will be violated unless the redistricting decisions can survive strict scrutiny. Indeed, "[a] number of the majority-minority districts that elected African Americans to Congress in 1992 and 1994 were later dismantled" under *Shaw* and its progeny, upon findings that they had been "drawn predominantly on the basis of race." Grofman, Handley, & Lublin, *supra*, at 1397. By contrast, if legislatures are permitted to draw coalition districts instead of majority-minority districts, race cannot be said to be the dominant and controlling

consideration in the redistricting decisions. Coalition districts depend heavily on non-racial factors, such as allegiances to a particular political party and the overall strength of that party in the district. Thus, the availability of such districts will lessen, if not wholly alleviate, the tension between equal protection and vote dilution principles.

Moreover, the concerns that guided the *Shaw* Court—that race-based redistricting, "even for remedial purposes, may balkanize us into competing racial factions," 509 U.S. at 657—are not implicated by coalition districts. First, *Shaw* noted that when district lines are contorted to bring together individuals who "may have little in common with one another but the color of their skin," it "reinforces the perception that members of the same racial group * * * think alike, share the same political interests, and will prefer the same candidates at the polls," and, accordingly, "may exacerbate the very patterns of racial block voting that majority-minority districting is sometimes said to counteract." 509 U.S. at 647-648. By contrast, with coalition districts, political affinity rather than skin color is the basis for district lines. Thus, there is little risk that coalition districts will "'convey the message that political identity is, or should be, predominantly racial.'" Pildes, *supra*, at 1547 (quoting *Bush v. Vera*, 517 U.S. 952, 980 (1996)).

Second, *Shaw* condemned race-based redistricting for sending a "pernicious" message to elected representatives that "their primary obligation is to represent only the members of [the racial group that controls the district], rather than their constituency as a whole." 509 U.S. at 648. Coalition districts implicate

no equivalent concerns. On the contrary, coalition districts necessarily require successful candidates to attract interracial support. This forces minority and majority populations to find common political ground, and forces elected officials to represent their entire constituency, rather than a particular racial group. See *De Grandy*, 512 U.S. at 1020. In this way, coalition districts "intrinsically counter" *Shaw*'s second concern. Pildes, *supra*, at 1543.

Thus, a holding that § 2 applies to coalition districts will bring this Court's cases under the Act into alignment with its equal protection cases.[9] Such a holding also makes sense in light of the overarching goals of the Act. The Act is intended "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490; see also *De Grandy*, 512 U.S. at 1020 (the Act is "meant to hasten the waning of racism in American politics"). Thus, "properly interpreted," the Act "should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 490.

The Court has recognized, however, that majority-minority districts may no longer be the most effective way to make this transition because "they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best.'" *De Grandy*, 512 U.S. at

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[9] Perhaps not surprisingly, this Court has only applied *Shaw* to invalidate majority-minority districts. See Pildes, *supra*, at 1547.

1020. Thus, "for all the virtues of majority-minority districts as remedial devices," their availability

> should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates might not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Ibid.; see also *Ashcroft*, 539 U.S. at 481 (the concentration of minority voters into majority-minority districts "risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts").

But for the pressure to draw majority-minority districts even where unnecessary to provide minority voters with the opportunity to elect their preferred candidates, the States would have significantly greater freedom to use other, race-neutral districting practices. District lines could "be drawn, for example, to provide for compact districts out of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw*, 509 U.S. at 646; accord *Miller*, 515 U.S. at 916 (describing "traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests").

These and other neutral approaches would be more freely available if States that would have drawn majority-minority districts to comply with § 2 could draw coalition districts instead.

Ironically, therefore, under the approach taken by the North Carolina Supreme Court, "voting-rights law itself might stand in the way" of society's transformation toward colorblindedness. Pildes, *supra*, at 1572. A holding by this Court that there is no remedy for vote dilution unless a majority-minority district may be drawn or that one or more coalition districts are not permitted when a majority-minority district is available—two inevitable results of a 50% rule—will lock majority-minority districts into place, despite evidence that such districts are no longer necessary in all cases. This would result in bypassing effective, integrated, coalition districts for majority-minority districts no longer tied to the substantive purposes of § 2 or this Court's precedents.

In sum, coalition districts encourage interracial political cooperation and reduce racial balkanization, while at the same time permitting minority groups to exercise their fair share of political power. As a result, § 2 protections for coalition districts advance the purposes of the Act by hastening our transition "to a society where race no longer matters." *Ashcroft*, 539 U.S. at 490; see also *Shaw*, 509 U.S. at 657.

CONCLUSION

The judgment of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record

June 2008

TERRY GODDARD
Attorney General of
Arizona
1275 West Washington
Phoenix, AZ 85007

EDMUND G. BROWN, JR.
Attorney General of
California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford, CT 06106

THURBERT E. BAKER
Attorney General of
Georgia
132 Judicial Building
40 Capitol Square SW
Atlanta, GA 30334

STEPHEN N. SIX
Attorney General of
Kansas
120 SW 10th Street
Topeka, KS 66612

JACK CONWAY
Attorney General of
Kentucky
Suite 118
700 Capitol Avenue
Frankfort, KY 40601

DOUGLAS F. GANSLER
Attorney General of
Maryland
200 Saint Paul Place
Baltimore, MD 21201

MARTHA COAKLEY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

JIM HOOD
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

ANNE MILGRAM
Attorney General of
New Jersey
P.O. Box 106
25 Market Street
Trenton, NJ 08625

GARY K. KING
Attorney General of
New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

NANCY H. ROGERS
Attorney General of Ohio
30 East Broad, 17th Floor
Columbus, OH 43215

AMICUS CURIAE BRIEF

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DĒMOS: A NETWORK FOR IDEAS AND ACTION, AND THE NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JON M. GREENBAUM
ROBERT A. KENGLE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

MATTHEW M. HOFFMAN
(Counsel of Record)
STEPHEN J. POLLAK
WILLIAM F. SHEEHAN
JOHN TOWNSEND RICH
MARY E. KOSTEL
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

Counsel for Amici Curiae
(Additional Counsel on Inside Cover)

June 17, 2008

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JOHN PAYTON
Director-Counsel
JACQUELINE A. BERRIEN
DEBO P. ADEGBILE
RYAN P. HAYGOOD
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson St.
Suite 1600
New York, NY 10013
(212) 965-2200

BRENDA WRIGHT
DĒMOS: A NETWORK FOR IDEAS AND ACTION
358 Chestnut Hill Ave.
Suite 303
Brighton, MA 02135
(617) 232-5885

INDERPREET SAWHNEY
HAIMAVATHI VARADAN MARLIER
ABHISHEK MATHUR
NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION
4800 Great America Pkwy., Suite 310
Santa Clara, CA 95054
(408) 565-0600

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights for all Americans.[1] Protection of the voting rights of racial

[1] The parties have consented to the filing of this brief in letters or e-mails on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party

and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 45 years, including several cases before this Court.[2] The Committee has also participated as *amicus curiae* in many other significant voting rights cases.[3]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. LDF has an extensive history of involvement in efforts to eradicate barriers to the full participation of African Americans in the political process, and has represented parties or participated as *amicus curiae* in numerous voting rights cases be-

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made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young* v. *Fordice*, 520 U.S. 273 (1997); *Clark* v. *Roemer*, 500 U.S. 646 (1991); *Clinton* v. *Smith*, 488 U.S. 988 (1988); *Connor* v. *Finch*, 431 U.S. 407 (1977).

[3] *See, e.g.*, *Riley* v. *Kennedy*, No. 07-77, 2008 U.S. LEXIS 4517 (May 27, 2008); *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Miller* v. *Johnson*, 515 U.S. 900 (1995); *Johnson* v. *De Grandy*, 512 U.S. 997 (1994); *Holder* v. *Hall*, 512 U.S. 874 (1994); *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Chisom* v. *Roemer*, 501 U.S. 380 (1991); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

fore this Court.[4] Of particular relevance to this case, LDF was counsel of record for the respondents in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court's leading case interpreting § 2 of the Voting Rights Act of 1965, as amended, the scope of which is at issue in this case.

Dēmos: A Network for Ideas and Action is a nonprofit, nonpartisan organization committed to building an America that achieves its highest ideals. That requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, an economy where prosperity and opportunity are broadly shared and disparity is reduced, and a revitalized public sector that works for the common good. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are key to these goals.

The North American South Asian Bar Association ("NASABA") is the umbrella organization for 25 regional bar associations in North America representing the interests of over 5,000 attorneys of South Asian descent. Within the United States, NASABA takes an active interest in the legal rights of South Asian and other minority communities, including voting rights.

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[4] *See, e.g.*, *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594 (2006); *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003); *Easley* v. *Cromartie*, 532 U.S. 234 (2001); *Bush* v. *Vera*, 517 U.S. 952 (1996); *Shaw* v. *Hunt*, 517 U.S. 899 (1996); *United States* v. *Hays*, 515 U.S. 737 (1995); *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991); *Chisom* v. *Roemer*, 501 U.S. 380 (1991); *Beer* v. *United States*, 425 U.S. 130 (1976); *White* v. *Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

SUMMARY OF ARGUMENT

In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court identified three "preconditions" to a vote dilution claim under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. The first *Gingles* precondition is that the relevant minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. It is well settled that § 2 plaintiffs can satisfy this precondition by demonstrating that it is possible to draw a reasonably compact single-member district in which minority voters are a simple numerical majority of the population of eligible voters. The issue in this case is whether plaintiffs can satisfy the first *Gingles* precondition where they cannot meet this numerical majority test.

Amici believe the answer to this question is yes. Plaintiffs should also be able to satisfy the first *Gingles* precondition by showing that it is possible to draw a reasonably compact single-member district in which minority voters—although not a numerical majority—nonetheless have a realistic potential to elect candidates of their choice. To prove their potential to elect candidates in such a district, § 2 plaintiffs should be required to demonstrate a predictable level of white crossover voting sufficient to enable minority-preferred candidates to win elections. In these circumstances, minority voters should be deemed a *functional* majority of the proposed district's population. At the same time, however, the Court should also reaffirm that § 2 plaintiffs satisfy the first precondition where it is possible to draw a single-member district that meets the traditional numerical majority test.

In Part I, we show that a functional majority test is consistent with the text of § 2 and the logic of *Gingles*. The statute guarantees minority voters an equal "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), but does not impose a numerical majority requirement as a precondition to relief. The purpose of the first *Gingles* precondition is to limit § 2 relief to situations in which minority voters have the potential to elect candidates of their choice. Minority voters always have that potential where a numerical majority-minority district can be drawn. But real-world election data show that notwithstanding the existence of racially polarized voting, minority voters can also have the potential to elect candidates in some districts where they are not a numerical majority. Relief under § 2 should not be foreclosed in such cases.

The North Carolina Supreme Court's concern that failure to adhere strictly to a bright line numerical majority test would create administrative difficulties and open a Pandora's box of new litigation is unwarranted. Proving a vote dilution claim under § 2 is already a demanding task. Proving the first *Gingles* factor under a functional majority test will be even more demanding, because it will require additional analysis and development of additional evidence that is not part of the existing § 2 calculus. Moreover, § 2 imposes numerous rigorous standards that cabin the scope of vote dilution claims—including most notably the requirement that plaintiffs prove the existence of racially polarized voting—and these standards will continue to apply to claims under a functional approach. Allowing plaintiffs to proceed on a functional majority theory therefore is not likely to significantly expand the scope of existing § 2 litigation.

Nor was the North Carolina Supreme Court correct in asserting that a "bright line" rule should be applied for reasons of administrative convenience. This Court has previously rejected such rigid approaches as inconsistent with the flexible nature of the § 2 inquiry. *See Johnson* v. *De Grandy*, 512 U.S. 997, 1017-21 (1994). And in any case, contrary to the North Carolina Supreme Court's assertion, a numerical majority test is not always simple or straightforward to administer. The so-called "bright line" of the numerical majority rule is, at times in actual practice, not as clear as the expression suggests. Moreover, it can encourage the parties to engage in numerical and map-drawing disputes that distract attention from what should be the key focus under § 2: whether minority voters have an equal opportunity to elect candidates of their choice.

We show in Part II that while § 2 plaintiffs should be permitted to proceed on a functional majority theory, they should not be required to do so. In other words, the Court should not simply replace the traditional numerical majority test—which courts have applied for more than two decades—with a new functional test. As *Gingles* and numerous lower court decisions make clear, satisfying a numerical majority test plainly suffices to establish potential to elect as a threshold matter because minority voters necessarily have the potential to elect candidates of their choice when they are an absolute majority of a district's population (even though in practice they may not do so in every case).

Moreover, requiring plaintiffs to prove their ability to elect candidates under a functional test in every case—even where it is clear that they could satisfy the simple numerical majority test—could pose a

substantial obstacle to § 2 plaintiffs who would otherwise have viable claims. A significant amount of § 2 litigation involves local elections for the governing bodies of small counties and municipalities. Many of these jurisdictions use at-large methods of voting or other electoral devices that this Court has recognized as being especially likely to have a discriminatory effect on minority voting strength. But in these jurisdictions, there is generally less voting data available for analysis, because there are fewer voting precincts, lower turnouts, fewer ballots cast, and often no primary elections. In such cases, even where the relevant data show a clear pattern of racially polarized voting, it may be difficult to make predictions about how a district with a particular racial composition will perform in actual practice. Yet experience shows that numerical majority-minority districts typically are an effective remedy for vote dilution in such cases. The Court should not undercut the effectiveness of this traditional remedy.

ARGUMENT

I. Minority Voters Should Be Able To Satisfy the First *Gingles* Precondition Under a Functional Majority Test.

The Supreme Court of North Carolina erred in holding that § 2 plaintiffs can never satisfy the first *Gingles* precondition unless it is possible to draw a single-member district in which minority voters are more than 50% of the eligible voting population. This Court should hold that § 2 plaintiffs can also satisfy the first *Gingles* precondition by proving—through reliable analysis of voting patterns and other relevant data—the existence of a predictable level of white crossover voting sufficient to give minority

voters a realistic potential to elect candidates of their choice in a proposed single member-district.[5] In these circumstances, minority voters constitute a *functional* majority of the proposed district's voting population, even though they are not, strictly speaking, a numerical majority.

A. The Functional Majority Test Is Consistent with the Text and Purpose of § 2 and the Logic of *Gingles*.

Nothing in the text of § 2 limits relief to cases in which it is possible to draw a majority-minority district. Nor is there anything in the legislative history that requires a numerical majority. *See* S. Rep. No. 97-417 (1982). The statute provides that a § 2 violation is established whenever the totality of the circumstances demonstrates that minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus, § 2 focuses on whether minority voters have an equal opportunity to elect their candidates of choice—not whether they constitute an absolute numerical majority of the electorate in any given district.

Moreover, Congress did not intend for the statute to be applied in a rigid, inflexible way. As *Gingles* observed, § 2 mandates that courts take a "'functional' view of the political process." 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 30 n.120 (1982)). In keeping

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[5] Members of a minority group can often also elect candidates of their choice through "coalition" voting with members of another minority group, *see, e.g., Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), but those circumstances are not presented in this case.

with that approach, this Court has stressed that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994); *Voinovich* v. *Quilter*, 507 U.S. 146, 158 (1993). And it has noted that the first *Gingles* precondition might need to be "modified or eliminated" to address a claim brought by minority voters who could not constitute a majority in a single-member district. *Id.*

The functional majority test outlined above is a reasonable and appropriate modification of the *Gingles* framework. The purpose of the first precondition is to limit § 2 relief to cases in which minority voters have a realistic potential to elect candidates of their choice. As the Court explained, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17. Likewise, in *De Grandy*, the Court explained that "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S. at 1008. This formulation of the first precondition focuses on whether minority voters have the ability to elect candidates in a given district—not whether they are an absolute numerical majority.

Of course, where minority voters are a numerical majority of a district's eligible voting population, they do have the potential to elect candidates of their choice. Hence, the simple numerical majority rule applied in *Gingles* makes sense, and should continue to be applied. But it does not follow that minority voters must be a numerical majority in order to have

the potential to elect candidates. *Gingles* recognizes that even where voting is polarized along racial lines, some crossover support for the minority's preferred candidates is likely. *See* 478 U.S. at 56 ("[I]n general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover' votes* rises to the level of legally significant white bloc voting.") (emphasis added). Where there is a sufficient level of predictable crossover support, minority voters will have the potential to elect candidates of their choice even where they are not a numerical majority.[6]

Real world data confirm this conclusion. For example, 20 of the current African-American members of the House of Representatives are elected from districts that do not have a majority African-American voting age population.[7] Additionally, a detailed analysis of congressional elections involving African-American candidates in the South in the 1990s by Professors Grofman, Handley and Lublin shows that minority candidates were elected in districts that were not majority-minority notwithstanding the ex-

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[6] Justice O'Connor expressly recognized this possibility in her concurring opinion in *Gingles*:

> "[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice." 478 U.S. at 90 n.1 (O'Connor, J., concurring in judgment).

[7] *See* Brief of *Amici Curiae* Sanford D. Bishop Jr. et al. in Support of Petitioners at 10 and App. F.

istence of racially polarized voting.[8] Minority candidates were able to win election in these districts because the African-American voters were highly cohesive and because, notwithstanding the continued presence of racially polarized voting, there was a small but consistent level of white crossover support for minority-preferred candidates.

In sum, the first *Gingles* factor focuses not on whether minority voters are a numerical majority, but on whether they have a realistic potential to elect their preferred candidates. Logic and experience both demonstrate that minority voters can have a realistic potential to elect their preferred candidates even where they are not a numerical majority of the electorate in a given district, and in those circumstances, minority voters should not be foreclosed from relief under § 2.

B. The North Carolina Supreme Court's Rationale for Requiring a Numerical Majority Is Unpersuasive.

The North Carolina Supreme Court's ruling in this case is not grounded in either the text of § 2 or the logic of this Court's decisions in *Gingles* and subsequent cases. Instead, it is based on a series of policy considerations intended to show that a "bright line" numerical majority rule is the only interpretation of the first *Gingles* precondition that courts and legislatures can reasonably administer. *See Pender County* v. *Bartlett*, 649 S.E.2d 364, 373–74 (N.C. 2007) (Pet.

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[8] Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1400–03 (2001).

App. 22a-25a). None of the rationales articulated by the North Carolina Supreme Court is persuasive.

1. *Allowing Functional Majority Claims Will Not Lead to a Flood of New § 2 Litigation.* The North Carolina Supreme Court expressed concern that without a "bright line" numerical majority rule as a threshold standard for evaluating § 2 claims, there would be a "Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," 649 S.E.2d at 373 (Pet. App. 24a) (citations and internal quotation marks omitted). The court did not explain how it came to this conclusion, but in any event this concern is unwarranted. Proving a vote dilution claim under § 2 is already a demanding task, typically requiring extensive analysis by one or more experts. This, by itself, discourages "marginal" claims. For a variety of reasons, permitting plaintiffs to satisfy the first *Gingles* precondition under a functional test will not significantly ease plaintiffs' burdens under the statute and therefore is not likely to cause a significant increase in § 2 litigation.

First, the functional test is likely to be more demanding than the simple numerical majority test because it will require plaintiffs to undertake additional analysis and explore new lines of evidence that are generally not part of existing § 2 presentations. Under the numerical majority test, proof of the first precondition is straightforward. To make a *prima facie* showing, a plaintiff need only proffer a proposed district, show that it is reasonably compact, and demonstrate through the use of census data that minority voters are a majority of the eligible voting population.

By contrast, proof of the first *Gingles* factor under a functional majority test is likely to require a more complicated analysis. While the Court need not identify in this case all of the factors that might be relevant to satisfying a functional test, we note that Professors Grofman, Handley and Lublin have proposed a model that involves analysis of relative participation rates between white and minority voters, the degree of cohesion and crossover voting, the dynamics of party primaries or other multi-stage electoral processes, and the effect of incumbency.[9] Such an analysis would go beyond what is currently required to satisfy the cohesion and racial bloc voting prongs of *Gingles*. Depending on the availability of data, it might be difficult for plaintiffs to make the necessary showing in many cases. *See* discussion *infra* at 24–28. Accordingly, even if a functional test is available, many § 2 plaintiffs will likely continue to rely on the simple numerical majority test to prove the first precondition.

Second, functional majority claims are inherently self-limiting. As many courts have recognized, there is some tension between the presence of a consistent level of crossover voting, as required to satisfy the first *Gingles* precondition under a functional test, and the third *Gingles* precondition, which requires proof that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. As noted above, *Gingles* recognizes that a finding of legally significant racially polarized voting is not inconsistent with some degree of white crossover voting. *See* 478 U.S. at 56. But the greater the extent of crossover voting, the less likely it is

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[9] *See* Grofman et al., *supra* note 8, 79 N.C. L. REV. at 1423.

that a court will find a legally sufficient level of racially polarized voting. *See, e.g.*, *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 943 n.9 (7th Cir. 1988) ("The existence of a cross-over, of course, weakens *pro tanto* the assumption of racial bloc voting."). Where a § 2 claim is premised on a very high level of white crossover voting, it will run a correspondingly high risk of being dismissed under the third prong of *Gingles*.

Third, minority voters cannot plausibly claim to be a functional majority in a proposed district unless they are a least a substantial minority of the district's population. How substantial that minority must be, of course, depends on the extent of crossover voting. But the fact that the threshold necessary to enable the election of minority-preferred candidates may be less than 50% does not mean that there is no threshold at all. As petitioners suggest, the minority group must, at a minimum, be "significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district." Pet. Br. 41.

Fourth, there are other limiting principles generally applicable in § 2 litigation that will further cabin the extent of claims under a functional majority test. The most significant of these is the principle of rough proportionality discussed in *De Grandy*. In that case, the Court rejected the notion that § 2 requires creation of the maximum possible number of majority-controlled districts, 512 U.S. at 1016–17, and recognized that proportionality, while not dispositive, provides a guide as to the number of effective majority-

minority districts that must be created.[10] Accordingly, the Court found no § 2 violation where "minority voters form[ed] effective voting majorities in a number of districts roughly proportional to minority voters' respective shares in the voting-age population." *Id.* at 1000. This reasoning indicates that a relaxation of the numerical majority rule should not require jurisdictions to create a number of new "functional" majority districts. Under *De Grandy*, if a jurisdiction has created a number of districts in which minority voters have an opportunity to elect candidates of their choice that is roughly proportional to minority voters' share of the population—regardless of whether those districts are traditional majority-minority districts or functional majority-minority districts—it should not face § 2 liability.[11]

Section 2 imposes other limitations as well. For example, this Court has made clear that any proposed district must be reasonably compact, which means it must "take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *League of United Latin*

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[10] Of course, as *De Grandy* makes clear, proportionality is not by itself a safe harbor. 512 U.S. at 1017–21; *see also id.* at 1025 (O'Connor, J., concurring) ("[P]roportionality . . . is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive."); 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[11] Legislatures and other redistricting bodies undoubtedly have some discretion in how they comply with their obligations under § 2, including whether to comply by creating functional majority-minority districts or traditional numerical majority-minority districts. *Cf. Georgia* v. *Ashcroft*, 539 U.S. 461, 480, 483 (2003).

Am. Citizens v. *Perry*, 126 S. Ct. 2594, 2618 (2006) (citations and internal quotation marks omitted). This rule would continue to apply to any proposed functional majority district, just as it would for any proposed numerical majority district.

Finally, it is important to bear in mind that the *Gingles* factors are only intended as gatekeeping conditions. Plaintiffs must still establish in every case that based upon the totality of the circumstances, minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see De Grandy*, 512 U.S. at 1011–12. Thus, the fact that § 2 plaintiffs can demonstrate the possibility of drawing a district in which they are a functional majority does not mean they will ultimately prevail in a vote dilution claim.

For all of these reasons, recognition of the functional majority test is unlikely to cause a flood of new litigation. Of course, some cases could be brought under a functional majority test that cannot be brought under a numerical majority test. But in practice, the functional approach is likely to be viable in just a few relatively discrete categories of cases. First, there are cases in which minority voters either fall just short of being a numerical majority or where there is a dispute over whether those voters constitute such a majority. Second, there are cases like this one which involve minority voters who have historically been able to elect candidates of their choice, but who do not constitute a numerical majority. Finally, there may also be a few cases in which a geographically compact and politically cohesive minority community has been divided among several districts, even though it could have constituted a functional

majority (and hence elected candidates of its choice) if the community had been left intact in one single-member district. If the other prerequisites for a vote dilution claim can be established, § 2 ought to provide a remedy in each of these circumstances.

2. *A Rigid and Inflexible "Bright Line" Test Is Inconsistent With the Statute.* The North Carolina Supreme Court also stated that a "bright line" numerical majority test "promotes ease of application" and "provides [state legislatures] with a safe harbor for the redistricting process." 649 S.E.2d at 373 (Pet. App. 23a-24a). This concern is misplaced here; the North Carolina legislature had no difficulty drawing a functional majority district and the state is not arguing for strict adherence to a numerical majority rule.

But in any case, ease of application for legislatures or other redistricting bodies is not a factor that is entitled to any significant weight in the interpretation of § 2. The Voting Rights Act is designed to protect the rights of *citizens*—not state legislatures. Adoption of rigid and inflexible bright-line rules for reasons of administrative convenience is inconsistent with Congress's purpose. That is why the Court has not adopted bright-line rules with respect to the second and third *Gingles* preconditions, and why, in *De Grandy*, it specifically rejected an interpretation of the first precondition that would have created a "safe harbor" for legislatures. *See* 512 U.S. at 1018 (holding that "[a]n inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of the circumstances'") (quoting 42 U.S.C. § 1973(b)).

3. *The "Bright Line" Test Is Not Always So Clear.* The North Carolina Supreme Court's statement that a numerical majority rule is "straightforward and easily administered" and can be applied "fairly, equally, and consistently," 649 S.E.2d at 373 (Pet. App. 23a), also overstates the case. More than two decades of experience with the numerical majority test have demonstrated that the so-called "bright line" is not always so clear in actual practice. Further, the rule can have the undesirable effect of encouraging disputes over numerical issues and map drawing, which distract attention from what should be the proper focus under § 2: creating districts in which minority voters have a realistic opportunity elect candidates of their choice.

The Fifth Circuit's decision in *Valdespino* v. *Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), is a case in point. In that case, Hispanic voters challenged the use of at-large elections for positions on a seven-member board of trustees for a local school district. Using 1990 census data, they demonstrated that it was possible to divide the school districts into seven single-member districts, including one in which minority voters would constitute a majority of the citizen voting-age population. Thus, based on census data, there should have been no question that plaintiffs satisfied a "bright line" numerical majority test.

Nonetheless, the district court held that plaintiffs had not cleared the hurdle of the first *Gingles* precondition. It permitted the school district to introduce evidence that, since the time of the census, one large apartment complex in the proposed majority-Hispanic district had been renovated and had lost population, while another large apartment complex

had been built outside the district, increasing population there. Taking these changes into account, the school district's expert concluded that it was not possible to draw a district in which Hispanic voters were more than 48.3% of the citizen voting-age population ("CVAP"). The district court credited this analysis and denied relief, and the Fifth Circuit affirmed, holding that *Gingles* mandates a strict, bright-line numerical majority rule.

The Fifth Circuit's decision reflects an unduly rigid and formalistic interpretation of § 2. This Court has long recognized the discriminatory potential of at-large election schemes like the one at issue in *Valdespino*. *See, e.g.*, *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) ("We have . . . stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . ."). [12] Where voting is sharply polarized along racial lines in such a jurisdiction, minority voters have as a practical matter no realistic opportunity to elect candidates of their choice in any election. In such circumstances, minority voters' ability to participate in the political process is curtailed just as effectively as if they had been denied access to the ballot altogether. Under the

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[12] *See also Gingles*, 478 U.S. at 47 ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.") (citations and internal quotation marks omitted); *Rogers* v. *Lodge*, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.").

facts of *Valdespino*, however, it seems likely that minority voters could have had a realistic opportunity to elect a candidate of their choice if at-large voting had been replaced by a single-member district system, regardless of whether they were a strict 51% majority of CVAP—as the census data showed—or merely a substantial 48.3% minority in a proposed district. If plaintiffs had been given the option of proceeding under a functional test, they would have had an opportunity to prove their ability to elect candidates in their proposed district; instead, they were denied relief altogether.

Thompson v. *Glades County Board of County Commissioners*, 493 F.3d 1253 (11th Cir. 2007), similarly illustrates that the so-called "bright line" rule is not so clear. That case involved a challenge to an at-large voting scheme in a small county, with a voting-age population ("VAP") of 8,329. Plaintiffs demonstrated that it was possible to draw a single-member district in which African Americans were 50.23% of VAP—a very small majority, but a majority nonetheless. Nonetheless, the district court held that the first *Gingles* precondition was not satisfied because the record did not contain evidence of "voter registrations, voting rates, or voter practices which would give real world meaning to the statistically sufficient district." *Id.* at 1262. A divided panel of the Eleventh Circuit reversed, holding—over a dissent from Judge Tjoflat—that (1) "[a] majority is a majority, by however how small a margin," *id.*, (2) there was no evidence to suggest that the white minority, at 33% of VAP, would turn out in sufficient force to outvote the African-American majority, and (3) in any event, there was sufficient white crossover voting to enable minority voters to elect candidates of choice in the

proposed district. But the Eleventh Circuit subsequently vacated the panel decision and granted *en banc* review. *See Thompson* v. *Glades County Bd. of County Comm'rs*, 508 F.3d 975 (11th Cir. 2007) (en banc). Thus, it is still unclear in the Eleventh Circuit whether even a literal majority is necessarily sufficient to satisfy the first precondition.

Thompson again illustrates the difficulties in attaching talismanic significance to a numerical majority as the *only* measure of a minority group's ability to elect candidates. This rigid approach encourages manipulation of numbers and indeed, the very concept of a "numerical majority." By contrast, recognition of a functional approach would discourage legislatures and courts from drawing fine distinctions between a 49.5% minority district and a 50.5% minority district—a difference that is unlikely to have much impact in the real world—and instead focus their attention on whether the plan, as a whole, has the effect of diluting minority voting strength.

4. *Potentially Meritorious Claims Should Not Be Dismissed at the Gatekeeping Stage.* The North Carolina Supreme Court also candidly acknowledged that "a bright line rule 'might conceivably foreclose a meritorious claim . . . .'" 649 S.E.2d at 373 (Pet. App. 24a) (quoting *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 943 (7th Cir. 1988)). This statement highlights the problem with a rigid bright-line rule. We are not aware of any principle of law that permits a federal court to close its doors to plaintiffs with a potentially meritorious § 2 claim merely for reasons of administrative convenience or because it doubts that the claim will ultimately be successful. As we have shown, there are some circumstances in which minority voters who do not have an equal opportunity

to elect candidates of their choice under an existing electoral system could elect candidates of their choice under an alternative system—notwithstanding their inability to satisfy the numerical majority test. That is why the numerical majority test should not be the only way of satisfying the first precondition.

II. The Court Should Reaffirm That a Minority Group Satisfies the First *Gingles* Precondition Where It Meets the Numerical Majority Test.

While § 2 plaintiffs should be permitted to rely on the functional test to satisfy the first precondition, they should not be *required* to do so. This Court and the lower courts have long permitted plaintiffs to satisfy the first *Gingles* precondition by showing that they are a simple numerical majority in a single-member district, and there is no reason to abandon that test in this case. Rather, plaintiffs should be permitted to satisfy the first precondition under either the functional test or the traditional numerical majority test.

A. Where Minority Voters Are a Numerical Majority They Necessarily Have the Potential To Elect Their Candidates of Choice.

The numerical majority test is consistent with the text of § 2 because minority voters necessarily have a realistic opportunity to elect representatives of their choice when they are a numerical majority of a district's population. The majority opinion in *Gingles* properly recognized that a numerical majority is sufficient to demonstrate that minority voters have the "*potential* to elect representatives." 478 U.S. at 50 n.17. Justice O'Connor's concurring opinion makes

the same point: "It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support . . . ." 478 U.S. at 90 n.1 (O'Connor, J., concurring in judgment).[13]

The courts of appeals have likewise consistently recognized that minority voters can elect candidates of their choice where they meet a numerical majority test. For example, the Fourth Circuit has stated that "minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district." *Hall* v. *Commonwealth of Virginia*, 385 F.3d 421, 429 (4th Cir. 2004).[14] In short, the numerical majority threshold is an appropriate proxy for identifying viable § 2 claims because it represents the point at which minority voters can elect candidates of their choice without *any* crossover support.

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[13] This is not to say that creation of a district in which minority voters are a bare numerical majority will ensure that they can always elect candidates of their choice. But Congress did not intend to guarantee minority voters a 100% chance of success in any election. Instead, the statute guarantees minority voters an equal "*opportunity* . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added).

[14] *See also Thompson*, 493 F.3d at 1262 ("50% numerical majority [is] sufficient" to satisfy the first precondition); *Cottier* v. *City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) (Native-American majorities have "potential to elect"); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988) (numerical majority standard allows courts to "estimate approximately the ability of minorities in a single-member district to elect candidates of their choice.").

B. Requiring Proof of a Functional Majority in Every Case Could Pose a Significant Obstacle for Many § 2 Plaintiffs and Undercut the Statute's Effectiveness As a Remedy for Vote Dilution.

There are also intensely practical reasons why the Court should not abandon the traditional numerical majority standard. As discussed *supra* at 12–13, a functional majority test is likely to be more demanding than the simple numerical majority test because of the need for additional data and analysis. The functional approach is likely to be especially problematic in cases involving local elections for governing bodies (*e.g.*, city councils, county commissions, and local school boards) in small counties and municipalities.

A substantial amount of § 2 litigation involves local election practices in these kinds of small jurisdictions—many of which employ at-large voting, multimember districts, or other devices that are likely to dilute minority voting strength.[15] For example, in *Thompson*, African American plaintiffs challenged the use of at-large elections for the county commission and school board in a county with a voting age population of only 8,329 people. 493 F.3d at 1256. And in *Cottier* v. *City of Martin*, 445 F.3d 1113 (8th Cir. 2006), Native American plaintiffs challenged the use of multimember districts in city council elections

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[15] By contrast, many of this Court's § 2 cases (including *Gingles*, *Growe*, *Voinovich*, *De Grandy*, and *Perry*) have involved challenges to Congressional or state legislative districting schemes.

in a city of only 1,078 people.[16] In these kinds of cases, plaintiffs who currently have a remedy under § 2 might not have a remedy if they were not permitted to rely on a numerical test. Requiring the use of a functional test would therefore undercut the statute's effectiveness as a remedy for vote dilution.

Proving vote dilution in local elections in small jurisdictions is materially different from proving vote dilution in the context of Congressional or state legislative redistricting cases because there are typically fewer voting precincts, fewer voters and lower voter turnout for purely local elections, and in many cases no primaries. Minority voters in these jurisdictions may be able to satisfy the cohesion and racial bloc voting prongs of *Gingles* through a combination of statistical analysis and anecdotal evidence, including the lack of success of minority-preferred candidates.[17] But proving that minority voters have the potential to elect candidates of their choice will require § 2 plaintiffs to make predictions about future voting behavior based on an analysis of past voting behavior and the racial composition of the proposed district. As noted above, this will likely require a statistical analysis of relative voter participation rates and the degree of minority and white voter cohesion and crossover voting, and potentially many other fac-

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[16] *See also United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004) (challenge to at-large elections for county commission in county of 7,009 residents).

[17] For example, in *Cottier*, the Eighth Circuit had no difficulty concluding that the second and third preconditions had been proven where plaintiffs presented statistical evidence and lay testimony of voter cohesion and the evidence showed a consistent pattern of minority-preferred candidates being defeated in elections in the multimember districts. 445 F.3d at 1119-21.

tors.[18] In small jurisdictions, the data may be insufficient to enable either side to conduct this analysis with sufficient statistical significance to make reliable predictions about the threshold population level necessary to give minority voters an equal opportunity to elect their candidates of choice. In other words, even when the data are clear in their general pattern—unambiguously showing racially polarized voting—they may be ambiguous in their specifics, hindering reliable predictions about future voting behavior. Minority voters should not be foreclosed from relief under § 2 just because they hail from a small county or town with fewer data points for analysis in circumstances where other available information sheds the necessary light.

Moreover, even where it is possible to conduct a functional analysis in these jurisdictions, that analysis is likely to underestimate minority voting strength. A functional analysis is necessarily based on trends observed in *past* elections, and use of a dilutive voting system tends to discourage minorities from participating in the electoral process. The Ninth Circuit acknowledged this depressive effect in *Gomez* v. *City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988). In reversing a district court's finding that a low turnout rate among Hispanic voters evidenced a lack of cohesiveness, the court noted that "[l]ow voter registration and turnout have often been considered evidence of minority voters' lack of *ability* to participate effectively in the political process" and that "de-

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[18] *See* Grofman et al., *supra* note 8, 79 N.C. L. REV. at 1423.

pressed registration rates may often be traceable in part to historical discrimination." *Id.* at 1416 n.4.[19]

The aftermath of *Gomez* demonstrates the limitations of an approach that relies on historical patterns to predict future voting behavior. Following the Ninth Circuit's decision, the at-large voting system in Watsonville was replaced with a system of single-member districts. A study of voter behavior in Watsonville concluded that the district system "effectively broke a racial barrier that kept Latino and other minority candidates from winning city council offices," paving the way for the election of a Latino mayor two years later.[20] Notably, it also led to a significant increase in Hispanic voter turnout.[21] Other studies have documented a similar effect.[22] Thus when dilution is remedied by creation of a majority-minority district, it is reasonable to expect that minority participation will increase, and minorities will have a greater opportunity to elect candidates of their choice than the backward-looking functional

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[19] *See also Uno* v. *City of Holyoke*, 72 F.3d 973, 986 (1st Cir. 1995) ("low voter turnout in the minority community sometimes may result from the interaction of the electoral system with the effects of past discrimination, which together operate to discourage meaningful electoral participation").

[20] Paule C. Takash, *Remedying Racial and Ethnic Inequality in California Politics: Watsonville Before and After District Elections*, 1 Chicano/Latino Policy Project Report 37 (1999), *available at* http://repositories.cdlib.org/issc/clpr/pr/Takash1999/.

[21] *Id.* at 38-39, 49.

[22] *See* Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) ("Majority-minority districting boosts Latino turnout . . . .").

analysis would suggest. This effect is difficult to quantify through statistical analysis, but that does not make it any less real.

The Court is not writing on a blank slate in this case. More than 25 years of experience in the application of amended § 2 has demonstrated that the creation of single member districts in which minority voters are a simple numerical majority has given those voters a meaningful opportunity to participate in the political process and to elect representatives of their choice for the first time in history. While *amici* believe the Court should reverse the judgment of the North Carolina Supreme Court and recognize the functional test, it should not do so in a manner that undercuts the effectiveness of § 2 as a remedy for the often severe vote dilution that persists in many jurisdictions across the country. To that end, the Court should also reaffirm the continued validity of the simple numerical majority test.

CONCLUSION

The judgment of the North Carolina Supreme Court should be reversed, and the matter remanded for consideration of whether minority voters in House District 18 are a functional majority and, if so, whether the totality of the circumstances requires the creation of a functional majority district in Pender and New Hanover Counties.

Respectfully submitted,

JON M. GREENBAUM
ROBERT A. KENGLE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

JOHN PAYTON
Director-Counsel
JACQUELINE A. BERRIEN
DEBO P. ADEGBILE
RYAN P. HAYGOOD
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St.
Suite 1600
New York, NY 10013
(212) 965-2200

MATTHEW M. HOFFMAN
(Counsel of record)
STEPHEN J. POLLAK
WILLIAM F. SHEEHAN
JOHN TOWNSEND RICH
MARY E. KOSTEL
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

BRENDA WRIGHT
DĒMOS: A NETWORK FOR IDEAS AND ACTION
358 Chestnut Hill Ave.
Suite 303
Brighton, MA 02135
(617) 232-5885

INDERPREET SAWHNEY
HAIMAVATHI VARADAN MARLIER
ABHISHEK MATHUR
NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION
4800 Great America Pkwy., Suite 310
Santa Clara, CA 95054
(408) 565-0600

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

GARY BARTLETT, *et al.*,
Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,
Respondents.

On a Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, N.W., # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

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INTEREST OF THE *AMICUS CURIAE*

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process.[1] The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women through the Nineteenth Amendment to the United States Constitution. Today, the League has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

The League has long been a leader in seeking to ensure that redistricting at every level of government promotes full and fair political participation by all Americans. In jurisdictions across the Nation, the League and its members participate in the redistricting process following each decennial census. And even before the "reapportionment revolution" commenced with this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the League worked to reform and modernize the redistricting process itself. *See, e.g., Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958) (three-judge court).

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[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than the League, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

Recognizing that the Constitution's promise of fair and effective representation can never be realized so long as any American citizen's right to vote is denied or abridged, the League supports federal legislation to make the Fifteenth Amendment every bit as effective for minorities as the Nineteenth Amendment has been for women. The League and its members have long supported the Voting Rights Act of 1965, having worked for the reauthorization of Section 5 and the 1982 amendments to Section 2, which guarantee minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Because progress toward racial equality in electoral politics has not advanced at a uniform pace across all American jurisdictions, no nationwide cookie-cutter rule can adequately guarantee equal electoral opportunity for all races, in all places, at all times. Therefore, the League respectfully asks this Court to reject the so-called "50% Rule" and to hold that a vote-dilution claim under Section 2 of the Voting Rights Act does not require that a minority community's size meet a rigid numerical quota.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, a sharply divided North Carolina Supreme Court adopted the so-called "50% Rule," which provides that a cognizable vote-dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, requires that a racial minority group be large enough to constitute a literal, mathematical majority of a district's adult citizen population. Pet.

App. 27a, 48a. In so holding, the court ordered the dismantling of a highly compact, roughly 40% black district that the State of North Carolina had drawn to comply with the Voting Rights Act. That district, North Carolina House District 18, is based in New Hanover County's seat, the city of Wilmington, but also extends into adjoining Pender County. Under the North Carolina Constitution, a state-legislative district may cross county lines only if required by the Voting Rights Act or other federal law.

House District 18 repeatedly had elected an African-American candidate who built a successful interracial coalition by attracting strong support from Wilmington's black community and limited but reliable support from some white voters. Indeed, House District 18 was the only district in the entire region that sent an African-American to the General Assembly, due to persistent racially polarized voting throughout the southeastern part of the State (New Hanover, Pender, and six other counties). But because Wilmington and the rest of New Hanover County lack enough African-Americans to populate 50.001% of a state-legislative district, the court below found the Voting Rights Act inapplicable.

That ruling is incorrect. This Court should reverse the judgment below and reaffirm that members of a racial minority group can state a cognizable vote-dilution claim for a "coalition district," where minority-preferred candidates can prevail with limited but reliable crossover support from other voters.

The plain text of Section 2 requires an effective voting majority, not a formalistic and rigid 50.001%

majority. Specifically, the statute guarantees minority group members an equal "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). Congress could have qualified that guarantee by adding the words "in districts where they constitute at least 50 percent of the citizens of voting age." But it chose not to do so.

Indeed, it would have been bizarre for Congress to insert a rigid racial quota into a statute intended "to hasten the waning of racism in American politics." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Section 2 was designed to equalize electoral opportunities across racial groups without needlessly injecting racial considerations into the political process. Over time, as voters become increasingly willing to judge candidates on their merits, rather than on the color of their skin, the demands of the Voting Rights Act must evolve. Congress enacted Section 2, after all, to foster our progress toward a color-blind politics, not to stymie that progress. According significance only to racially "safe" districts that are more than 50% African-American (or more than 50% Latino) would thus be antithetical to the very purpose of Section 2.

Ignoring both text and purpose, however, the court below read the 50% Rule into the statute based on a misunderstanding of the three-prong test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The first of those three prongs requires Section 2 plaintiffs to show that their racial group is "sufficiently large . . . to constitute a majority in a single-member district." *Id.* at 50. Of course, the *Gingles* Court that coined this "majority"

requirement was construing Congress's text, not overruling it. And language in *Gingles* and later decisions suggested that the first *Gingles* prong referred to an "effective voting majority," not an absolute mathematical majority. *E.g.*, *De Grandy*, 512 U.S. at 1000, 1014, 1021; *see id.* at 1008 ("[T]he first *Gingles* condition requires the possibility of creating . . . [additional] districts with a sufficiently large minority population *to elect candidates of its choice*." (emphasis added)); *see also Gingles*, 478 U.S. at 38, 46 n.11 (referring to "effective voting majorities" and "ineffective [voting] minorit[ies]"). In the 16 cases in which this Court has cited *Gingles*, it has never superimposed an extratextual 50% requirement onto Section 2.

The court below, however, took that step because it assumed the statute's "opportunity to elect" standard was not "practicable." Pet. App. 26a. To the contrary, the "opportunity to elect" standard has not been unduly difficult for States to comply with or for trial judges to manage. *See, e.g.*, cases cited *infra* note 3. The standard calls for precisely the same evidence that the second and third prongs of the *Gingles* test already require Section 2 plaintiffs to produce in order to prove significant racially polarized voting. In this case, that evidence conclusively established that North Carolina House District 18 was a strong coalition district that gave African-American citizens a full "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b).

The court below also held, incorrectly, that replacing the statute's "opportunity to elect"

standard with a judge-made 50% Rule would be "more logical and more readily applicable in practice." Pet. App. 19a-20a. But the 50% Rule would lack the benefits normally ascribed to bright-line rules. *First*, rather than simplifying redistricting litigation, attaching talismanic importance to the distinction between a 50.001% black district and a 49.999% black district necessarily would raise a slew of complex legal and factual issues, all of which can be avoided by holding coalition-district claims cognizable.[2] *Second*, imposing an ironclad 50% Rule would invite partisan manipulation of the Voting Rights Act, one of our Nation's greatest civil-rights statutes.

The court below also overlooked the substantial costs that switching to the 50% Rule would impose. *First*, the 50% Rule would create strong incentives for States to redraw reasonably compact coalition districts to turn them into majority-black districts. To reach that 50% target, redistricters would feel pressure to subordinate traditional race-neutral districting principles and to revert to the practices of the early 1990s, when States drew countless bizarrely misshapen racial gerrymanders in violation

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[2] Although Section 2 of the Voting Rights Act protects many racial and language minority groups — including Latinos, Asian-Americans, and Native Americans — this brief will often speak in terms of "blacks" (or "African-Americans") and "whites," which is both simpler and more pertinent to the southeastern region of North Carolina, where these two racial groups constitute about 97% of the population.

of the Equal Protection Clause. *See infra* pages 33, 35, and 37 (showing maps).

Second, and relatedly, eliminating districts like the one at issue here, which is roughly 40% black, would discourage the building of cross-racial coalitions. African-American candidates in heavily black districts would not need white support, and white candidates in heavily white districts would not need African-American support. One could hardly devise a better scheme for rolling back our Nation's recent progress toward ending racial isolation in politics. To do so in the name of the Voting Rights Act would be wrong.

ARGUMENT

I. THE TEXT AND PURPOSE OF SECTION 2 OF THE VOTING RIGHTS ACT AUTHORIZE COALITION-DISTRICT CLAIMS.

Section 2 of the Voting Rights Act prohibits redistricting plans that, "based on the totality of circumstances," are shown to offer members of a protected racial or language minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The plain text of Section 2 thus focuses on minority groups' ability "to elect representatives of their choice." *Id.* Section 2 says nothing about "majority-black" or "majority-Latino" or "majority-minority" or "safe minority" districts. And it says nothing about "50 percent of the citizens of voting age."

The absence of any reference to a 50% Rule is fatal to respondents' case, because Congress knew

well how to include such language when it wanted to do so. Indeed, the Act's Section 4 ordered the Director of the Census to draw up a list of jurisdictions where election turnout had fallen below "50 per centum of the citizens of voting age." 42 U.S.C. § 1973b(b). But Congress did not use those words in Section 2 of the Act. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (citations and internal quotation marks omitted). Therefore, the Court should presume that Congress intentionally omitted from Section 2 any reference to a 50% threshold.

That omission should come as no surprise. Mandatory balkanization based on strict racial quotas would have been antithetical to Congress's central purpose in passing the Voting Rights Act: "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). Requiring the creation of 50% black districts even where they are unnecessary to elect minority-preferred candidates would not reduce race consciousness, either in the redistricting process itself or in the political campaigns that follow. As Chief Justice Burger observed, using a "mathematical formula" to design safe minority districts "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling

particular racial, ethnic, or religious groups in enclaves." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 186 (1977) (dissenting opinion). In redistricting, "rigid adherence to quotas," *id.* at 185, threatens to carry us further from Congress's "goal of a political system in which race no longer matters," *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

The basis for the proposed 50% Rule can therefore be found neither in the plain text of Section 2 nor in the congressional purpose motivating its enactment. Rather, that inflexible rule originated in some lower courts' misreading of this Court's gloss on the statute. In *Thornburg v. Gingles*, this Court established three "necessary preconditions" for proving vote dilution under Section 2: The plaintiffs' minority group must show that (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) its preferred candidates "usually" are defeated by white bloc voting. 478 U.S. at 50-51. But the *Gingles* Court warned against applying this three-prong test mechanically and instead called for a "flexible, fact-intensive," and "functional" approach to the political process, focusing on "intensely local," district-specific facts. *Id.* at 45-46, 48 n.15, 77-80.

As to the issue presented here, the *Gingles* Court explained that the test's first prong is needed because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or

practice." *Id.* at 50 n.17. And in assessing whether African-American concentrations were sufficiently large "to constitute effective voting majorities in [new] single-member districts" — that is, whether blacks had the potential to elect their preferred candidates — the Court considered the "size of the district" and the "percentage of registered voters in the district who are members of the minority group," as well as factors that would be irrelevant under the 50% Rule, such as the "number of minority group members [who] usually vote for the same candidates" and the number of "white 'crossover' votes" that those same minority-preferred candidates could reliably expect to attract. *Id.* at 38, 56.

As was typical in voting-rights litigation in the 1980s, the *Gingles* plaintiffs did not propose any new districts where blacks would have constituted less than 50% of the population. The Court therefore had no occasion to consider whether Section 2 permits "a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district." *Id.* at 46-47 n.12. In her concurrence, however, Justice O'Connor noted that voters belonging to such a minority group could nonetheless demonstrate their ability "to elect representatives of their choice" by showing that sufficient "white support would probably be forthcoming in some such district." *Id.* at 90 n.1 (O'Connor, J., concurring in judgment).

Over the next twenty years, this Court repeatedly assumed, without deciding, that "it is possible to state a § 2 claim for a racial group that makes up less than 50% of the [proposed district's] population,"

LULAC v. Perry, 126 S. Ct. 2594, 2624 (2006) (plurality opinion), so long as the group is large enough to elect its candidates of choice "with the assistance of cross-over votes from the white majority" or from other racial groups, *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *see, e.g.*, *De Grandy*, 512 U.S. at 1009. And in dicta, the Court clarified that *Gingles*'s "sufficiently large . . . to constitute a majority" language focuses on electoral opportunity, rather than on an absolute numerical majority: "[T]he first *Gingles* condition requires the possibility of creating . . . [additional] districts with a sufficiently large minority population *to elect candidates of its choice*." *De Grandy*, 512 U.S. at 1008 (emphasis added); *cf. id.* at 1020-21 ("No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.").

Despite this Court's guidance, the wording of the first *Gingles* prong has generated two conflicting interpretations in the lower courts. Some courts, including the North Carolina Supreme Court in this case, have misunderstood the first *Gingles* prong's use of the word "majority" to demand proof that a minority group can constitute a mathematical "majority" of a district's population. Pet. App. 27a. Other courts, citing the statute's plain text and *Gingles*'s concern for minority voters' "*potential* to elect representatives," 478 U.S. at 50 n.17, have understood the word "majority" as referring to an effective voting majority capable of "elect[ing] representatives of [the minority voters'] choice," 42 U.S.C. § 1973(b); *see, e.g.*, *Metts v. Murphy*, 363 F.3d

8, 11-12 (1st Cir. 2004) (en banc).[3] The United States, which has responsibility for enforcing Section 2, *see* 42 U.S.C. § 1973j(d), has taken the same position, dating back at least to 1990.[4]

The statutory text here is clear and should be followed. After all, the *Gingles* Court that coined the "majority" requirement was construing Congress's text, not overruling it. The word "majority" in *Gingles* and its progeny should therefore be understood to effectuate the statutory text

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[3] *See also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 373-77, 381-404 (S.D.N.Y.) (three-judge court), *summarily aff'd*, 543 U.S. 997 (2004); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320 n.56, 1322 (S.D. Fla. 2002) (three-judge court); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694-95 (E.D.N.Y. 1992) (three-judge court); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court); *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three-judge court); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court), *summarily aff'd sub nom. Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984); *Metts v. Murphy*, 347 F.3d 346, 2003 WL 22434637 (1st Cir. 2003) (withdrawn from bound volume following grant of rehearing en banc, which led to same result); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853, 857 (N.J. 2003); Pet. App. 35a-50a (dissenting opinions).

[4] *See, e.g.*, Br. for U.S. as *Amicus Curiae* at 19-20 & n.10, *LULAC v. Perry*, 548 U.S. 399 (No. 05-276); Br. for U.S. as *Amicus Curiae* at 6-15, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (No. 98-1987); Br. for U.S. as *Amicus Curiae* at 11, 17-18, *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997); Br. for U.S. at 33-38, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). *But see* Br. for U.S. as *Amicus Curiae* at 10, 16, *Voinovich v. Quilter*, 507 U.S. 146 (1993) (No. 91-1618).

guaranteeing minority voters an equal "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). The language of a judicial opinion must be "read in context" and not "parsed" like a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Reading the *Gingles* test in context, the Court should reject the 50% Rule as contrary to Section 2's plain text and overarching purpose, hold coalition-district claims cognizable, and reverse the judgment below.

II. THE "OPPORTUNITY TO ELECT" STANDARD DICTATED BY THE STATUTORY TEXT HAS PROVED TO BE JUDICIALLY MANAGEABLE.

Congress expressly chose a standard — the "opportunity to elect" standard — that state legislatures and other redistricting authorities could readily apply and that trial judges could efficiently manage. The court below flatly erred in suggesting that this standard needed to be replaced because it lacked any "logical or objective measure for establishing a threshold minority group size necessary for Section 2 legislative districts." Pet. App. 25a (citation and internal quotation marks omitted). To see why the court below is wrong, it is first necessary to explain briefly the types of evidence that plaintiffs typically adduce to meet the statute's "opportunity to elect" standard.

A determination of whether an existing or proposed district affords minority voters a realistic "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), *begins* with the district's racial composition. But it does not end there. Two additional facts must be analyzed. *First*, do the

district's minority group members turn out to vote at a different rate than others in the district (and if so, what is the magnitude of the difference)? *Second*, do the district's minority voters support different candidates than other voters in the district do (and if so, what is the magnitude of that difference)? *See generally* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1403-08 (2001).

The answers to these two questions can be critically important in evaluating minority voters' actual electoral opportunities. For example, in this case, as to the second question, the evidence showed a significant asymmetry between black voters and white voters in and around North Carolina's House District 18. Especially in elections pitting one African-American candidate against one white candidate, African-American voters tended to be much more unified in supporting the African-American candidate than the white voters were unified in opposing that candidate. J.A. 123-26. This pattern prevailed in eight out of nine elections analyzed below and was statistically significant in seven of those elections. *See id.*

For example, when Sandra Spaulding Hughes (who now represents House District 18) ran in the November 1999 election for Wilmington City Council, she won the black vote roughly 93% to 7%, but lost the white vote roughly 33% to 67%. *Id.* at 126. Obviously, voting was racially polarized, as blacks and whites overwhelmingly supported opposing candidates. *See Gingles*, 478 U.S. at 59-60 & n.28,

80-82 (finding legally significant white bloc voting where minority candidates lost while garnering about one third of the white vote). As with any election exhibiting racially polarized voting, the winner would be determined by the racial composition of the electorate. In an electorate that was only 20% black, for instance, Ms. Hughes would have lost. But a 50% black electorate clearly was not needed for her to win. Indeed, a 50% black electorate would have generated a landslide 63%-to-37% victory for Ms. Hughes.

These findings are not atypical for this region of North Carolina. The evidence below showed that, on average, African-American candidates in these elections captured about 92% of the African-American vote but only about 25% of the white vote. *See* J.A. 123-26. Under these conditions, so long as black turnout rates are not dramatically lower than white turnout rates, black candidates preferred by black voters can win in constituencies that are — like the district at issue here — approximately 40% black. Pet. App. 5a.[5]

Calculating the rates of black and white turnout and the rates of black and white support for particular candidates has been a mainstay of Section 2 litigation at least since *Gingles*, nearly a quarter century ago. There, the Court relied on expert testimony using two standard statistical techniques — "extreme case analysis" and "bivariate ecological

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[5] Here is the arithmetic: 40% x 92% ≈ 37%. 60% x 25% = 15%. And 37% + 15% = 52%, a clear majority of the vote.

regression analysis" — to "yield[] data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates." *Gingles*, 478 U.S. at 52-53. The Court held that these estimates made out a showing of legally significant racially polarized voting, which satisfied the second and third prongs of the *Gingles* test. *See id.* at 52-74. Since that time, these same statistical techniques have been applied by plaintiffs and defendants alike in hundreds of Section 2 cases. *See generally* BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 82-108 (1992).[6]

Indeed, these analyses are absolutely unavoidable under the three-part *Gingles* test. Without running these statistical techniques, it would be difficult or impossible to prove the second and third *Gingles* prongs. And once these statistical techniques have been run for purposes of the second and third prongs, it takes only the simplest arithmetic to apply the results to the first *Gingles* prong as well.

One additional technique that is routinely used in Section 2 litigation to assess racially polarized voting

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[6] In this case, the expert, Professor Richard L. Engstrom, used both of these techniques, as well as a third technique, "Ecological Inference," that is essentially a sophisticated hybrid of the first two. J.A. 117-18; *see also* GARY KING, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM (1997); *cf. Gingles*, 478 U.S. at 46 n.11, 48 n.15, 53 n.20, 55, 71 (citing Professor Engstrom's scholarship). The estimates cited above in text were derived using this newer technique.

and to determine the effectiveness of minority districts is too simple even to be called "statistical." When a candidate backed by the African-American community has run statewide, the vote totals for that candidate and his or her opponent can readily be calculated for any district that the legislature has enacted and for any alternative district that Section 2 plaintiffs might propose. If the minority-preferred candidate carried the vote in the plaintiffs' proposed district but not in any of the challenged districts covering the same area, that simple fact, especially if replicated across several elections, may suggest that the challenged map illegally dilutes minority voting strength. *See, e.g.*, *LULAC*, 126 S. Ct. at 2615 ("[Latino-preferred candidates] won the majority of the [proposed] district's votes in 13 out of 15 elections for statewide officeholders."); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 395-97 (S.D.N.Y.) (three-judge court) (using "recompiled" election returns, which require no "statistical estimates, complicated regression analyses, or margins of error"), *summarily aff'd*, 543 U.S. 997 (2004).

Here, for example, North Carolina's then-Supreme Court Justice (now Congressman) G.K. Butterfield, who is African-American, lost a statewide election and failed to carry either New Hanover or Pender County, yet he prevailed handily, 64% to 36%, in the New Hanover and Pender County precincts that now comprise House District 18.[7]

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[7] *See* North Carolina General Assembly, House Redistricting Plans: Election Results; J.A. 35.

That is a powerful indication that this district provides a real opportunity for African-American voters to overcome racially polarized voting and elect a representative of their choice — even though the district's black population falls well short of 50%.[8] No court would deny the relevance of that evidence to the second and third *Gingles* prongs, and this Court should not render it irrelevant as a matter of law to the first *Gingles* prong by superimposing on Section 2 an extratextual 50% requirement.

III. THE BENEFITS OF REPLACING THE "OPPORTUNITY TO ELECT" STANDARD WITH THE 50% RULE WOULD BE MINIMAL.

The court below sought to justify its rigid 50% Rule on the ground that a bright-line rule of decision would be more easily and consistently applied. Pet. App. 23a-24a. But the usual benefits of bright-line rules — that they promote clarity, ensure uniformity, and cabin discretion — do not accrue to the 50% Rule. Indeed, actually applying this seemingly hard-

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[8] Evidence of this kind would not invariably justify an inference that a proposed district would afford minority voters a realistic opportunity to elect their preferred candidate. That inference might be precluded by special circumstances, such as evidence that the minority-preferred candidate would have to run as a challenger against a white incumbent. *See* Grofman, Handley & Lublin, *supra*, at 1404, 1411, 1415, 1419-23 (noting that black candidates need higher black percentages when they run against white incumbents); *cf. Gingles*, 478 U.S. at 57, 60 & n.29 (explaining why black incumbents' success did not necessarily show that minority voters had a realistic opportunity to elect).

and-fast rule turns out, on closer inspection, to be awfully hard and hardly fast.

A. The 50% Rule Would Raise a Host of Complex Legal and Factual Issues.

Acknowledging that the 50% Rule "'might conceivably foreclose a meritorious claim,'" the court below justified that cost by pointing to likely gains in "judicial economy." *Id.* at 23a-24a (citation omitted). But far from ending legal disputes about how to interpret and apply the first *Gingles* prong, adopting the 50% Rule would only multiply them.

The goals of clarity and uniformity would be better served by rejecting the 50% Rule and thus avoiding at least four thorny subsidiary legal issues. Because only one of these four issues is squarely presented on the record below, adopting the 50% Rule in this case would leave three of these critical issues unresolved for future litigation, causing more confusion among redistricters and more splits among the lower courts.

1. Fixing the "Denominator"

As the North Carolina Supreme Court explained, a 50% Rule poses the question, 50% "of *what*?" Pet. App. 15a. Contrary to Fourth and Sixth Circuit precedents,[9] the North Carolina court held that the answer was citizen voting-age population ("CVAP") — that is, total resident population minus children

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[9] *See Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004) (requiring 50% voting-age population, or "VAP"); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998) (same).

and noncitizens, neither of whom have voting rights. *Id.* at 17a. That solution seems to comport with the plain text of the statute, which speaks of "citizens" and "members of the electorate." 42 U.S.C. 1973(b); *see also LULAC*, 126 S. Ct. at 2616, 2619-21 (using CVAP to measure proportionality and electoral opportunity because "only eligible voters affect a group's opportunity to elect candidates"). *But cf. Karcher v. Daggett*, 462 U.S. 725, 727-44 (1983) (using total population, including children and noncitizens, to analyze "one person, one vote" claims); *id.* at 771-72 (White, J., dissenting).

What the North Carolina Supreme Court ignored, however, was that the official redistricting data published decennially by the Census Bureau (known as the "P.L. 94-171 file") provides no information on citizenship. That is because the census form delivered to every American household asks no questions about citizenship. Therefore, CVAP percentages for any proposed district must be calculated by combining voting-age population ("VAP") figures from the P.L. 94-171 file with citizenship estimates from another source, such as the Census Bureau's American Community Survey ("ACS"). The ACS is, as its title indicates, a survey, not an actual headcount, based on a rolling, multi-year sample of American households. ACS citizenship data therefore will reflect population on various dates, not the date of the decennial headcount. And ACS citizenship data will not be available for the smaller geographic units, such as "census blocks," that form the foundational building blocks for electoral districts.

Because CVAP measures necessarily rely on estimates, different experts, applying different methodologies to combine the P.L. 94-171 and ACS datasets, will reach conflicting conclusions about the African-American CVAP percentage for any given district. Districts that appear to exceed 50% black CVAP under some estimates will appear to fall just short of the 50% threshold under equally plausible alternative estimation techniques. And even if a district consistently falls on one side of the 50% line using any reasonable estimate of CVAP, it may well fall on the other side using VAP. Until the lower courts — and eventually this Court — resolve these questions about the proper "denominator," legislators will battle continually over whether the proper legal test uses VAP or CVAP and over the best statistical methods for estimating CVAP.

These ambiguities will leave too much unchanneled discretion in the hands of political line-drawers, especially in States with large noncitizen populations. Legislators from a State's dominant political party will adopt whichever interpretation suits their partisan interests. And legislators from the "out" party will couch their partisan grievances in race-based terms, injecting racialized arguments into the legislative record to lay the groundwork for an eventual Section 2 challenge in court. It would be a bitter irony indeed if this Court's attempt to impose bright-line clarity on the Voting Rights Act transformed it into a tool for "burden[ing] representational rights." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (plurality opinion).

But if the Court rejects the 50% Rule outright and holds coalition-district claims cognizable, this issue will be rendered moot. Absent the 50% Rule, what matters is proof that minority group members can elect their preferred candidate in the plaintiffs' proposed district — not what precise percentage they constitute of the district's relevant population. *Cf. De Grandy*, 512 U.S. at 1017 n.14 (finding no need to choose between VAP and CVAP as a measure of proportionality, because neither should be treated as a "magic parameter").

2. Fixing the "Numerator"

A second area ripe for dispute is the proper "numerator" under the 50% Rule. When African-Americans bring a Section 2 case and claim to constitute a mathematical majority of the relevant population, who should count as an African-American? This issue is complicated because of the way the Census Bureau structures its questions on race and ethnicity. The Census form's race question has six answers — White, Black or African-American, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, and Some Other Race. Each individual may check any number of those boxes, from one to six. The Census form has a separate question for Hispanic or Not Hispanic. Together, there are 126 combinations for answering these questions — 62 of which are at least somewhat ambiguous when determining who should count as "African-American" for purposes of the 50% Rule. Does someone who checked black and Hispanic count as black, or as Hispanic, or as both? Does someone who checked black and white count as

black? What about someone who checked black and Asian?

The U.S. Department of Justice's Civil Rights Division, while purporting to follow the Office of Management and Budget's guidance on how to count these persons, in fact seems to have adopted a contrary methodology. *Compare* 66 FED. REG. 5412, 5414 (Jan. 18, 2001) (allocating to the black category only half of the black/Hispanic and black/Asian populations) *with* OMB Bulletin No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement (Mar. 9, 2000) (allocating to the black category the entire black/Hispanic and black/Asian populations, when discrimination against African-Americans has been alleged). Others might use yet a third method. *See, e.g.*, *Thompson v. Glades County Bd. of County Comm'rs*, 493 F.3d 1253, 1263 n.18 (11th Cir.) (rejecting district court's preferred method, which counted only single-race, non-Hispanic blacks as African-American), *vacated and reh'g en banc granted*, 508 F.3d 975 (11th Cir. 2007).

The impact of answering these questions one way rather than another is hardly trivial. The 2000 Census found more than 2.4 million Americans who fell into one of the 62 arguably ambiguous categories. *See* U.S. Bureau of the Census, Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000. And in *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (three-judge court), *vacated*, 539 U.S. 461 (2003), the status of two state senate districts as majority-black or majority-nonblack hinged on how these categories were

treated. *See id.* at 38 & n.11, 56; *see also Georgia v. Ashcroft*, 539 U.S. at 473 n.1; *cf. LULAC*, 126 S. Ct. at 2613 (analyzing a district that was 55% Latino in total population, 51% Latino in VAP, and only 46% Latino in CVAP).

As with the "denominator" issue, this "numerator" issue would be dispositive only under the 50% Rule, which artificially exaggerates the significance of precise demographic figures. To make out a coalition-district claim, minority group members must show that they could actually elect their preferred candidates in their proposed district, not that they are sufficiently numerous to barely outnumber other adults (or other adult citizens) in that district.

3. Fixing the "Numerator" in Cases Brought by More than One Minority Group

Another legal question that is not even remotely presented on the record below but that would come to the fore if (and only if) this Court adopts the 50% Rule is whether two or more minority groups can be aggregated to reach the 50% threshold. For example, under the 50% Rule, blacks who constitute only 40% of a district might demand to be combined with a Latino population that constitutes 15%, to create a "majority-combined-minority district." At least two of the circuits that have adopted the 50% Rule have already diverged over whether such a claim is cognizable. *Compare, e.g., Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding claim cognizable), *with Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (holding claim not cognizable). Absent the 50% Rule,

however, that question is likely irrelevant. If the black community that constitutes 40% of the district can forge coalitions with enough nonblack voters to actually win elections, it doesn't matter whether the coalition partners are Latino, white, Asian-American, or any other race.

4. *Fixing the* De Grandy *"Rough Proportionality" Defense*

Yet another legal question raised by the 50% Rule focuses not on the minority district that plaintiffs propose to create, but on other minority districts that already exist in the challenged map. Under this Court's seminal opinion in *De Grandy*, a key factor to consider in Section 2's "totality of circumstances" inquiry is whether the number of minority districts in the challenged map is already "roughly proportional" to the minority group's share of the population. *See* 512 U.S. at 1000. If it is, then the challenged map likely is not denying minority voters an equal opportunity to elect representatives of their choice. *See id.* at 1020-21. Although rough proportionality is never a "safe harbor," it is a strong indicator that a defendant is complying with Section 2. *Id.* at 1017-21; *see id.* at 1025-26 (O'Connor, J., concurring); *id.* at 1027-28 (Kennedy, J., concurring in part and concurring in judgment).

But what counts as a "minority district" for purposes of determining rough proportionality? If this Court adopts the 50% Rule, could a State invoke its coalition districts when arguing that it has already created enough minority districts? To adjudicate that defense, courts would have to make the very same determinations about the effectiveness

or ineffectiveness of the State's coalition districts that the 50% Rule is designed to obviate. And consequently, when drawing districts, state legislatures would have to make similar determinations about the effectiveness of potential coalition districts. In other words, under this interpretation of *De Grandy* (in which coalition districts do "count"), adopting the 50% Rule would not even eliminate the problem it is intended to solve.

Under the opposite interpretation, which applies the 50% Rule symmetrically to claims and defenses, a State could invoke only majority-black districts when arguing for a rough-proportionality defense under *De Grandy*. Coalition districts would not count. Applying the 50% Rule evenhandedly to claims and defenses alike seems reasonable, since generally a statute "is to be interpreted as a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995). Indeed, this Court unanimously stated in *Growe v. Emison*, 507 U.S. 25 (1993), that the measure of whether a Section 2 violation has occurred is also the measure of whether a Section 2 violation has been remedied. *See id.* at 38 n.4. In other words, if there is no Section 2 right to a coalition district, the creation of a coalition district cannot compensate for the lack of a majority-black district. *Cf. LULAC*, 126 S. Ct. at 2617 (making the analogous argument as to noncompact minority districts, and rejecting "a one-way rule whereby plaintiffs must show compactness but States need not").

But symmetrically applying the 50% Rule to the *De Grandy* rough-proportionality defense would create a bizarre anomaly, in which plaintiffs could force a defendant to *maximize* the number of minority districts. A hypothetical helps illustrate the problem. A county that is 65% white and 35% black is governed by a five-member commission. Voting in the county is racially polarized. The county draws two 45% black districts that reliably elect minority-preferred candidates, and three 28% black districts that reliably elect white-preferred candidates. Minority plaintiffs sue under Section 2 of the Voting Rights Act, demanding that the three heavily white districts be redrawn to make one of them majority-black (while leaving the two coalition districts untouched). Even though two of the five districts in this 35% black county are already electing minority-preferred candidates, the county could not successfully invoke *De Grandy*'s rough-proportionality defense because the minority districts are 45% black coalition districts that do not "count," rather than majority-black districts complying with the 50% Rule. So the plaintiffs win their Section 2 suit, the county is forced to create a third minority district, and the white majority will be able to elect its preferred candidates in only two of the county's five districts. The 35% of the county's population that is black would determine electoral outcomes in 60% of the county's districts.

This is a formula for race-based maximization, not fair and effective representation for all citizens. As the *De Grandy* Court explained, it would be "absurd" to suggest that a districting plan's failure to

maximize a minority group's "effective political power . . . indicates a denial of equal participation in the political process. Failure to maximize cannot be the measure of § 2." *De Grandy*, 512 U.S. at 1017. Yet, ironically, this could be the outcome of replacing the statute's "opportunity to elect" standard with the rigid 50% Rule.

B. The 50% Rule Would Not Prevent Partisan Manipulation of the Voting Rights Act.

Another benefit of many bright-line rules, especially in the election-law arena, is that they reduce the danger that legal decisions will be reached on the basis of ideological or political preference. Advocates of the 50% Rule sometimes claim this benefit and assert that coalition-district claims unfairly favor the political party that is more heavily supported by minority voters. That assertion, however, is misguided.

As an initial matter, both major political parties have a powerful incentive to compete for the votes of white and black citizens alike. That has been particularly true during the period of partisan parity that has prevailed in the United States since the mid-1990s.

Moreover, legally mandating the creation of additional minority districts generally tends to help the minority-backed political party in some States and to hurt it in others. *See* Kenneth W. Shotts, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, 45 AM. J. POL. SCI. 120, 128 (2001). For example, all other things being equal, mandating additional minority districts tends to help Democrats

in a Republican-leaning State like Texas, where it ensures at least some minimum number of Democratic districts. But it tends to hurt Democrats in a Democratic-leaning State like California, where it prevents Democratic mapmakers from spreading their strength across the maximum number of districts. Likewise, mandating additional minority districts hurts Republicans in South Florida, where the largest minority population is Cuban-American and votes heavily Republican. The idea that increasing the number of coalition districts consistently helps one political party, at the expense of the other, is therefore unfounded.

To be sure, any particular legal constraint on redistricting — or, for that matter, the removal of any legal constraint — can have a partisan impact in some cases, given the "inherently political" nature of redistricting. *Abrams v. Johnson*, 521 U.S. 74, 117 (1997) (Breyer, J., dissenting). But the 50% Rule is no less susceptible than coalition-district claims to being abused as a partisan tool.

Where Democrats control the redistricting process, they might take advantage of the 50% Rule to draw fewer minority districts and more districts controlled by white Democrats. For example, where voting is racially polarized and an African-American community is not quite large enough to fill half of a legislative district, the "opportunity to elect" standard might require placing the black community into one coalition district where African-American voters could elect their preferred representative. And that could make the adjoining district tilt Republican. But under the 50% Rule, the

Democratic mapmakers could refuse to draw the coalition district and instead could split the black community down the middle, ensuring two Democratic-leaning districts, both of which are likely to elect white candidates not preferred by minority voters.

Conversely, in an area such as North Carolina's New Hanover and Pender Counties, where the only Democratic district is a coalition district, Republicans might take advantage of the 50% Rule to dismantle that coalition district, fragment its African-American population among several districts, and thereby capture every legislative seat in the area. Here, respondents are the three Republicans on the five-member Pender County Commission; the two Democratic commissioners chose not to pursue this appeal. If the suit ultimately succeeds, the district now represented by the sole Democrat in the House delegation for Pender and New Hanover Counties will have to be redrawn, which would likely render the delegation 100% Republican.[10]

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[10] Currently, the two-county delegation to the North Carolina House of Representatives consists of Ms. Sandra Spaulding Hughes, an African-American Democrat from New Hanover County, who represents parts of both counties in District 18; Ms. Carolyn Justice, a white Republican from Pender County, who represents parts of both counties in District 16; and Mr. Daniel McComas, a white Republican from New Hanover County, who represents part of New Hanover County in District 19. For a color map of these districts, see Pet. App. 132a.

The simple truth is that politicians of any stripe will attempt to take advantage of redistricting laws. The 50% Rule is no exception.

IV. THE COSTS OF REPLACING THE "OPPORTUNITY TO ELECT" STANDARD WITH THE 50% RULE WOULD BE SUBSTANTIAL.

The 50% Rule's rather meager benefits would be more than offset by its costs. *First*, the 50% Rule would encourage States to subordinate traditional districting principles to racial considerations, as they would seek to push naturally formed coalition districts up over the arbitrary 50% mark by slicing off white neighborhoods and reaching out to grab distant pockets of black population. These incentives would heighten tensions between Section 2 and the Equal Protection Clause, with no offsetting gains to minority representation. *Second*, mandating the 50% Rule would retard the continued integration of American politics, as it would require the systematic replacement of racially mixed districts like the one at issue here with "safe" districts where one racial group easily dominates the electoral process.

A. The 50% Rule Would Revive the Racial Gerrymandering of the Early 1990s.

Adopting the 50% Rule could reverse much of the progress that race-neutral line-drawing has made in the 15 years since this Court decided *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). Those decisions held that the excessive and unjustified use of race in redistricting violated the Fourteenth Amendment's Equal Protection Clause. *See Miller*, 515 U.S. at 916; *Shaw*, 509 U.S.

at 649. In the 1990s, courts applying the *Shaw/Miller* doctrine struck down more than a dozen bizarrely irregular majority-minority congressional districts in Alabama, Florida, Georgia, Louisiana, New York, North Carolina, South Carolina, Texas, and Virginia. *See* J. GERALD HEBERT *ET AL.*, THE REALISTS' GUIDE TO REDISTRICTING 50 (A.B.A. 2000).

But the rarely told part of that story is that only one African-American Member of Congress lost his seat as a result. Why? Because (with one exception, in Louisiana) those districts were replaced by reasonably compact districts that were still fully capable of electing black candidates preferred by black voters — and many of those replacement districts were no longer majority-black. They were coalition districts.

After the post-2000 round of redistricting, not a single congressional district was invalidated for racial gerrymandering. And not a single congressional district looks like the North Carolina congressional district at issue in the *Shaw* litigation. Maps 1-A and 1-B portray silhouettes of the *Shaw* district, before and after it was struck down by this Court. Map 1-A shows the majority-black version of the district that North Carolina used in the 1992, 1994, and 1996 elections.

Map 1-B shows the coalition-district version that was used in the 1998 election. The same African-American Congressman prevailed in all four elections (and remains in Congress today).

MAP 1-A

53% Black Version of North Carolina CD 12

MAP 1-B

33% Black Version of North Carolina CD 12

A similar example comes from Texas's Thirtieth Congressional District. It was originally drawn in 1991 with the goal of inching up over the 50% threshold. *See Vera v. Richards*, 861 F. Supp. 1304, 1319 (S.D. Tex. 1994) (three-judge court) (noting that the district was intentionally drawn to be just over 50.0% African-American in VAP), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996); *see also Bush v. Vera*, 517 U.S. at 966 (plurality opinion) ("[T]he redistricters pursued unwaveringly the objective of creating a majority-African-American district."). To reach 50%, the mapmakers had to shoot seven tentacles out from the district's heavily African-American core to reach smaller, distant pockets of black population. *See Vera*, 861 F. Supp. at 1319. And the tentacles had to be extremely thin, lest they pick up too much intervening white population. The result, as shown in Map 2-A, would make Jackson Pollock proud.

Following this Court's decision in *Bush v. Vera*, which struck the district down as an unconstitutional racial gerrymander, *see* 517 U.S. at 957, it was redrawn as a 42% black coalition district. Notably absent from the 1996 coalition-district version, shown in Map 2-B, are the seven tentacles that marked the 1991 version.

MAP 2-A

50% Black Version of Texas CD 30

MAP 2-B

42% Black Version of Texas CD 30

The state-legislative district at issue in this case had a similar evolution, though its constitutionality under the *Shaw/Miller* doctrine was not actually litigated in the 1990s. Map 3-A shows the 1992 version, which the State of North Carolina drew at the U.S. Department of Justice's insistence. J.A. 68. The district (known then as District 98) elected an African-American state representative with overwhelming support from Wilmington's black community. Pet. App. 61a, 114a; J.A. 41-42. Under the 1990 census, its voting-age population was 56% black. Pet. App. 61a.

As redrawn today (*see* Map 3-B), the district's voting-age population is just under 40% black. The district (renumbered as House District 18) nonetheless reelected the same African-American state representative. And when the seat became vacant, he was replaced by an African-American successor, Sandra Spaulding Hughes, who is also strongly backed by Wilmington's black community.

MAP 3-A

56% Black Version of North Carolina HD 98 (now 18)

MAP 3-B

39% Black Version of North Carolina HD 18

These examples (as well as others shown in Maps 4-A through 5-B in the appendix to this brief) exhibit one constant and two variables. The one constant is that the initial early-1990s districts *and* their replacements elected African-American candidates preferred by African-American voters. What varied is that as the districts became more respectful of traditional nonracial districting principles (and thus more compact), the African-American percentage of the population dropped from more than 50% to less than 50%. Reducing race-consciousness in line-drawing thus did not reduce minority representation.

Adopting the 50% Rule would likely throw this process into reverse, stimulating a revival of racial gerrymandering. In many areas, rejiggering an indisputably compact coalition district to push its minority percentage up over an artificial 50% black threshold would require the same sorts of excessively race-based line-drawing that the *Shaw/Miller* doctrine has largely succeeded in eradicating. States should not be placed in the same quandary they faced during the 1991-1992 redistricting, feeling pressure to push the limits of the Equal Protection Clause in order to comply with the Voting Rights Act. *See Miller*, 515 U.S. at 927-28.

B. The 50% Rule Would Stymie the Continued Racial Integration of American Politics.

Just as adopting the 50% Rule would make the redistricting process itself more race-conscious, it also would foster racial isolation in our electoral politics. That would be a major step backwards.

In the early years of Voting Rights Act enforcement, it was widely believed that minority districts could overcome white bloc voting and elect minority-preferred candidates only if the minority group constituted at least 65% of the total population. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984) (citing sources). Later, the effectiveness threshold was thought to have dropped to about 50%. Today, as this Court recognized in *Georgia v. Ashcroft*, political scientists agree that in many places that figure has declined by another 10 or 15 percentage points. *See* 539 U.S. at 480, 483 (citing Grofman, Handley & Lublin, *supra*; Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002)).

In 1982, when Congress last amended Section 2, only four African-American Members of Congress hailed from districts whose voting-age populations were less than half black.[11] By contrast, today, most of the 41 African-American Members of Congress represent such constituencies, and there remains only one congressional district in the entire Nation that is at least 65% black.[12] This progress in overcoming racial isolation should be celebrated, not stymied.

At the same time, it is an empirical reality that the threshold at which minority voters have an

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[11] *See* POLITICS IN AMERICA 1982, at 103, 150, 156, 1190 (1981).

[12] *See* CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS 1143, 1160 (2007).

opportunity to elect their preferred candidates varies significantly depending on the State, the particular area within a given State, and the particular minority group or groups at issue. *Compare, e.g.*, *Page v. Bartels*, 144 F. Supp. 2d 346, 362-66 (D.N.J. 2001) (three-judge court) (holding that a 27.5% black district in New Jersey satisfied Section 2), *with Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007) (holding that a 54.5% Indian district in South Dakota did not satisfy Section 2).

All of this suggests that rejecting rigid numerical quotas and interpreting Section 2 flexibly will allow the Voting Rights Act's strictures to continue evolving as politics and housing patterns become increasingly integrated and as minority leaders build their capacity to "pull, haul, and trade" with their white counterparts. *De Grandy*, 512 U.S. at 1020. Over time, majority-black and majority-Latino districts will continue to be replaced by coalition districts, many of which will come to resemble microcosms of our increasingly diverse Nation. And the Voting Rights Act will naturally unwind itself, as it helps pave our "transition to a society where race no longer matters." *Georgia v. Ashcroft*, 539 U.S. at 490.

CONCLUSION

The decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, NW, # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

JUNE 17, 2008

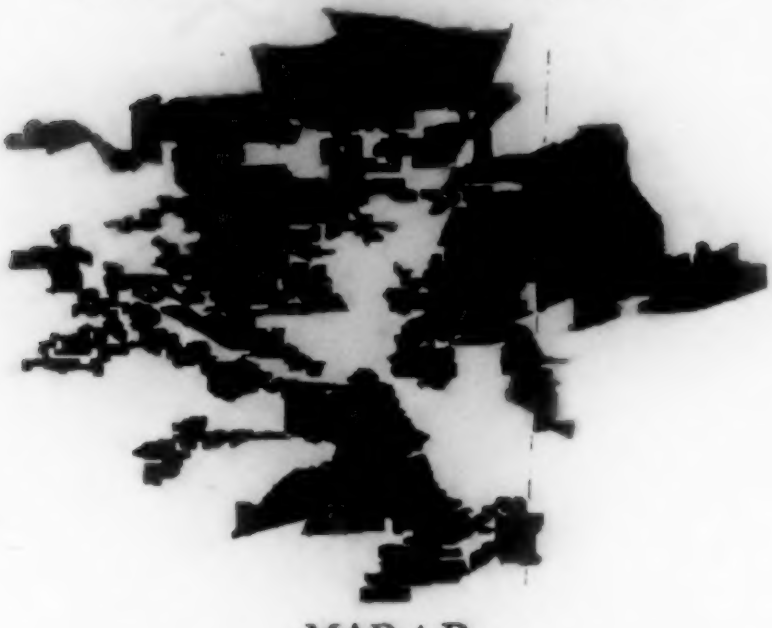
APPENDIX

Maps 4-A through 5-B

APPENDIX

MAP 4-A

51% Black Version of Texas CD 18



MAP 4-B

44% Black Version of Texas CD 18

MAP 5-A

61% Latino Version of Texas CD 29

MAP 5-B

41% Latino Version of Texas CD 29

AMICUS CURIAE BRIEF

95

(16)

No. 07-689

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IN THE

Supreme Court of the United States

GARY BARTLETT, *et al.*,

Petitioners,

vs.

DWIGHT STRICKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA SUPREME COURT

BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE ASIAN AMERICAN JUSTICE CENTER AS *AMICI CURIAE* ON BEHALF OF PETITIONERS

NINA PERALES
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476

LOIS D. THOMPSON
Counsel of Record
MICHAEL J. LEBOWICH
TRAVIS P. BRENNAN
GREGG SALKA
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
(310) 557-2900

TERRY M. AO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 296-2300

Attorneys for Amici Curiae

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This *amicus curiae* brief is submitted on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") and the Asian American Justice Center ("AAJC") in support of Petitioners.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")

MALDEF is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF has represented Latino and minority interests in voting and civil rights cases in the federal courts, including before this Court in *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594 (2006). MALDEF therefore has a strong interest in the outcome of these proceedings.

---

1. Pursuant to Supreme Court Rule 37.3(a), the *Amici Curiae* state that the parties have consented to the filing of this brief and that they have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici Curiae* further state that no one other than MALDEF, AAJC and their counsel made a monetary contribution to the preparation or submission of this brief.

MALDEF agrees with petitioners that a categorical 50% rule should not be imposed as a condition that minority voters must meet before they may pursue a vote dilution claim under the Voting Rights Act. *Amici* write separately, however, to suggest how the *Thornburg v. Gingles*, 478 U.S. 30 (1986), prerequisite relating to the size of a minority group in a single-member district ought now to be modified and to underscore the continued importance of the Voting Rights Act in securing for racial minority voters equal opportunity to elect candidates of their choice.

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE ASIAN AMERICAN JUSTICE CENTER ("AAJC")

AAJC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC focuses its work to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. Collectively, AAJC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on voting rights in striving to protect Asian Americans' access to the polls, including playing a key role in 2006 in the reauthorization of the Voting Rights Act of 1965. AAJC was also an *amicus*

curiae in *Crawford v. Marion Co. Election Bd.*, 128 S. Ct. 1610 (2008), opposing the Indiana voter photo identification requirement as disproportionately depriving Asian Americans of the right to vote and providing an invitation to discriminate against Asian American voters.

The question presented by this case is similarly of great interest to AAJC as it implicates the availability of voting rights protections for Asian Americans in this country.

SUMMARY OF ARGUMENT

Although "bright line" tests may have their uses, no bright lines are contemplated by the Voting Rights Act, 42 U.S.C. § 1973, the legislative history of the Act, or this Court's prior opinions. *Amici* urge the Court to reject a literal and mechanistic interpretation of the Act and of the statement in *Thornburg v. Gingles*, 478 U.S. 30, 51-52 (1986), that a minority group asserting a violation of Section 2 must demonstrate that it constitutes a majority in a single-member district ("the first *Gingles* prerequisite").

A less doctrinaire, more flexible approach is far more consistent with the language and purposes of the Act. When "society's racial and ethnic cleavages . . . necessitate majority-minority districts to ensure political and electoral opportunity, . . ." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), such districts will continue to be drawn. And, as we show below, majority-minority districts are required in certain parts of the country and under certain circumstances to ensure

electoral opportunity. Indeed, the persistence of racially polarized voting and the legacy of past discrimination, as well as, unfortunately, instances of recent discrimination, all demonstrate the continued need for the Voting Rights Act and, specifically, the creation of majority-minority districts to achieve the purposes of the Act. However, when the facts establish the existence of districts like North Carolina House District 18, in which African-Americans constitute fewer than 50% of the voters in the district but are able to elect candidates of their choice, the courts will countenance the creation of those districts[2] and thereby give full force to "a statute meant to hasten the waning of racism in American politics." *Id.*

Amici request the Court to answer the question presented by holding that a minority group satisfies the first *Gingles* prerequisite in one of two ways: (1) when it constitutes a numerical majority of a proposed district's population or (2) if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over non-minority votes, it has the ability to elect candidates of its choice.[3]

---

2. As discussed more fully below, see *infra*, at pp. 20-21, cross-over districts like North Carolina House District 18 are distinct from "influence" districts. "Influence" districts are not in issue in this case and do not offer minority voters the opportunity to elect candidates of their choice.

3. "Minority coalition" districts, discussed *infra*, at pp. 19-20, are not before the Court. Nothing in this brief is intended to preclude or limit the ability of minority groups in coalition to assert Section 2 claims of vote dilution under either prong of the *Gingles* prerequisite as formulated above.

ARGUMENT

POINT I

THERE IS NO SUPPORT FOR A BRIGHT LINE "50% RULE" IN THE ACT, ITS LEGISLATIVE HISTORY, OR THE PRIOR OPINIONS OF THIS COURT

In their submissions to the Court, Petitioners and other *Amici* have demonstrated that "the Gingles factors cannot be applied mechanically and without regard to the nature of the claim," *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), and that there is no place for a rigid, "bright line" rule in the interpretation and application of a statute like the Voting Rights Act which "'is peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (internal citations omitted). The MALDEF and AAJC *Amici* will not burden the Court by repeating that presentation here but incorporate and rely on it to inform their discussion of the question before the Court.

POINT II

BECAUSE RACIALLY POLARIZED VOTING, BLOC VOTING, AND IMPEDIMENTS TO MINORITY GROUP VOTING PERSIST IN MANY JURISDICTIONS, THE VOTING RIGHTS ACT CONTINUES TO PLAY A VITAL ROLE IN SECURING EQUAL OPPORTUNITY FOR RACIAL AND LANGUAGE MINORITY VOTERS

The Voting Rights Act of 1965 continues to play a vital role in ensuring that minority voters are able to participate meaningfully in the political process and elect candidates of their choice. Although more than four decades have passed since the original Act was signed into law, voting-related discrimination against racial and language minorities persists. As discussed in detail below, just since the 2000 Census, which generated the last major redistricting effort, the courts have been presented with numerous voting schemes that have diluted the votes of minority voters and, in some cases, have prevented them from voting at all.

Violations occur in a wide array of districts, counties and states, in all sections of the country, in both covered and non-covered (§ 5) jurisdictions and against various racial and language minority groups. It remains a troubling fact that, in many areas and in many circumstances, racially polarized voting and, in some instances, intentional acts of discrimination have prevented large numbers of minority voters from electing the candidates of their choice. The cases discussed below are merely a subset from the last eight years that barely scratch the surface in highlighting the violations that still regularly occur.

In its most recent examination of the Act, the Court, in *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594 (2006), addressed these very problems. A five-member majority found that the Texas Legislature had, in violation of Section 2 of the Act, dismantled a Latino opportunity district (District 23) when it drew its congressional redistricting plan. The District Court found, and this Court acknowledged, that racial polarization and bloc voting were prevalent throughout the State of Texas, with the specific district in question showing extreme polarization (92% of Latinos voted for one candidate, while 88% of Anglos voted for another). *Id.* at 2615. Then, in examining the totality of the circumstances affecting the redistricting, the Court found that the Legislature had intentionally redrawn the district to protect an incumbent, who was not the preferred candidate of Latino voters, from a Latino constituency that had been gaining in numbers in the district and had been voting against him. *Id.* at 2623.

The Court specifically noted that before the redistricting, the Latino share of the citizen voting-age population had been 57.5% in District 23 while, after the redistricting, the Latino share of the citizen voting-age population had dropped to 46%. *Id.* at 2615. It then quoted the District Court's finding that in the redrawn district, Latino voters were "'certainly not an effective voting majority.'" *Id.* at 2613. The Court held that the redrawing of District 23 constituted vote dilution in violation of Section 2 of the Act. [4]

---

4. On remand, District 23 was redrawn to comply with the Court's ruling. The District Court's 2006 remedial redistricting (Cont'd)

The lower courts, too, have confronted telling evidence of the persistence of racially polarized voting when called on to adjudicate challenges to post-2000 Census redistricting plans. In *Colleton Co. Council v. McConnell*, 201 F. Supp. 2d 618, 640-641 (D. S.C. 2002), for example, the District Court noted that racially polarized voting in South Carolina is "long and well-documented" and "has seen little change in the last decade." Specifically, the court found that voting was racially polarized in all regions of the state and that white voters engaged in significant bloc voting. These findings were supported by statistical evidence showing that between 1992 and 2000, black voters voted for black candidates in 98% of general elections in which a black candidate and a white candidate were contesting a single seat and that "white voters almost always vote in blocs to defeat the minority's candidate of choice." *Id.* Further, the court remarked on the "extensive documentation of the history of voting-related racial discrimination in South Carolina," *id.* at 641, and the "[e]vidence of the depressed socio-economic and educational status of blacks in the state which hinders their ability to participate effectively in the political process and to elect representatives of their choice. . . ." *Id.* at 642. The court

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(Cont'd)

plan created a new District 23 with a 57.4% Latino citizen voting-age population. *League of United Latin American Citizens ("LULAC") v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006). Incumbent Henry Bonilla, who, in 2002 had received only 8% of the Latino vote and was found not to be the Latino-preferred candidate in *Session v. Perry*, 298 F. Supp. 2d 451, 519 (E.D. Tex. 2004), was defeated by Ciro Rodriquez in the election that followed the 2006 redistricting. Office of United States Representative Ciro Rodriquez, http://www.rodriquez.house.gov.

declined to permit the creation of proposed "influence" districts with black voting-age populations ranging from 44.61% to 48.19% of the total voting-age population and instead found, after consideration of extensive expert and other evidence, that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." *Id.* at 643.

The District Court in *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1024 (D. S.D. 2004), *aff'd*, 461 F.3d 1011 (8th Cir. 2006), rejected South Dakota's 2001 legislative redistricting plan because it illegally "packed" Native Americans into a district with a 90% supermajority and thereby minimized the total number of districts in which Native Americans had the opportunity to elect candidates of their choice. In reaching that conclusion the District Court considered extensive evidence of racially polarized voting together with five illustrative redistricting plans drawn by plaintiffs' expert, all of which showed that it would be possible to create at least one additional majority Native American district in South Dakota. *Id.* at 1010-17.

In its analysis of the totality of the circumstances affecting electoral opportunity, the *Bone Shirt* court referenced trial evidence of "recent efforts on the part of South Dakota political subdivisions to deny Indians the right to participate in the political process." *Id.* at 1023. It cited as one example an instance that had occurred as recently as 1999, when Day County, South Dakota officials specifically designed the boundaries of their sanitary district to exclude land owned by Native Americans (notwithstanding that it comprised 87% of

the relevant land area) and thereby denied the Native American owners of that land the right to vote. *Id.* The court also noted the many barriers to Native American voter registration that had been erected by state officials, *id.* at 1024-25, and quoted statements by state legislators who opposed an effort after the 2002 election to enact laws that would have made it easier for Native Americans to register. Such statements included the following, which the court found "referenced Indian voters." "'I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system . . . I'm not sure we want that sort of person in the polling place. I think the [existing] effort of registration . . . is adequate.'" *Id. at 1026* (internal citations omitted).

In yet another post-2000 case, *St. Bernard Citizens For Better Gov't v. St. Bernard Parish Sch. Bd.*, 2002 U.S. Dist. LEXIS 16540 (E .D. La. Aug. 28, 2002), *amended* September 4, 2002, a Louisiana District Court struck down a school board plan adopted by parish voters to move from eleven single-member districts to five single-member and two at-large districts because it found that the new plan was dilutive of the votes of the parish's black population as compared to the previous plan. In reaching that conclusion, the court cited evidence of discrimination, racial polarization and bloc voting. It quoted at length from the lower court decision in *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1116 (E. D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U. S. 905 (1989), saying that it "aptly" described the parish's history of racial segregation:

> [I]t would take a multi-volumed treatise to properly describe the persistent, and often

> violent, intimidation visited by white citizens upon black efforts to participate in Louisiana's political process.

St. Bernard Citizens, at *29. Summing up its analysis of the factors set forth in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, the court concluded:

> With respect to the seventh factor, whether members of the minority group have been elected to public office in the parish, the answer is "no." Only three blacks have run and none has come even close to being elected . . . [T]his factor, along with racial polarization in voting, [which the court separately stated was "clearly present"] is considered the most significant in support of a voting rights violation.

Id. at *33-*34.

At-large election schemes continue to give rise to Section 2 violations throughout the country. In *United States v. Blaine Co.*, 363 F.3d 897 (9th Cir. 2004), the Ninth Circuit affirmed a District Court holding that an at-large scheme for electing members of a Montana county commission violated Section 2. The Court of Appeals described the challenged scheme as follows:

> The Blaine County Commission consists of three commissioners, each of whom must reside in one of three different residential districts. Each commissioner is elected by

> a majority vote of . . . the district. The commissioners serve six-year staggered terms, such that [in] each even-numbered year one commissioner stands for election.

Id. at 900. Although Native Americans constituted 45.2% of the population and 38.8% of the voting-age population in the county, a Native American had never been elected to the county commission. *Id.* After reviewing the evidence of political cohesion and bloc voting that had been considered by the lower court, the Court of Appeals also discussed the evidence that supported the District Court's finding that "Blaine County's electoral procedures enhanced the opportunity for discrimination against American Indians." *Id.* at 914. In particular, the court remarked that the "evidence showed that staggered terms prevent[ed] American Indians from bullet voting, and the County's enormous size [made] it extremely difficult for American Indian candidates to campaign county-wide in at-large elections." *Id.* at 913-914 (footnote omitted). Finally, the Court of Appeals observed that after the District Court ruled, the county had submitted a remedial plan, adopted by the court, that provided for three single-member districts. In the first election conducted under that new plan, the voters in County District 1, which had a Native American voting age population of just over 87%, elected Blaine County's first Native American County Commissioner. *Id.* at 901 & n.2.

In *United States v. Osceola Co.*, 475 F. Supp. 2d 1220, 1222 (M.D. Fla. 2006), the United States sued to "'cure the dilution of Hispanic votes caused by [a Florida] [c]ounty's at-large method of electing for seats on that

body.'" (Internal citations omitted.) The county defendants conceded that Latinos in the county were politically cohesive and that white voters usually voted in a bloc to defeat minority candidates. *Id.* at 1232. The Government's expert provided evidence that "most elections in the County are ethnically polarized and that the degree of polarization is 'extraordinarily high.'" *Id.* After reviewing the evidence, the court concluded that

> there has been a history of a lack of Hispanic success at the polls, except for the brief period when the County employed a single-member district plan. Since 1996, no Hispanic candidate has been elected to either the [County Commission] or the County's School Board despite the fact that Hispanic candidates continue to run and the Hispanic population continues to grow. Indeed, even Hispanic-preferred candidates [who were not themselves Latino] have historically been unable to attain public office in countywide (at-large) elections.

Id. at 1233 (internal citations omitted). Holding that the County's at-large election system violated Section 2, the court also discussed evidence of recent instances of discrimination against Latino voters and candidates in the County. Focusing on elections held in 2000, the court wrote:

> Hispanics suffered from discrimination at the polls when they were turned away without being allowed to vote, refused assistance, forbidden to use their own interpreters, asked

> for multiple forms of identification (unlike non-Hispanic voters), and treated in a hostile manner by poll workers.

Id. at 1235. The court then noted that the County had entered into a consent decree with the Department of Justice in 2002 and had agreed to provide information and assistance to voters in Spanish, but, according to the court, "[w]hile this has improved conditions somewhat, problems have persisted and the County has not met all of the requirements of that decree." *Id.*

Just this year, in *United States v. Vill. of Port Chester*, 2008 U.S. Dist. LEXIS 4914 (S.D.N.Y. Jan. 17, 2008), the Southern District of New York found that Latinos were denied "an equal opportunity to participate in the political process" by the at-large voting system of the Village of Port Chester, New York. *Id.* at *1. Although Latinos made up 46.2% of the Village population, it was "undisputed that no Hispanic candidate has ever been elected to public office in Port Chester — not Mayor, not to the Board of Trustees, and not to the School Board." *Id.* at *73. Further, plaintiffs' experts presented evidence that in 12 out of 16 elections between 2001 and 2007, "the candidates of choice of Hispanic voters in Port Chester were defeated by the candidates of choice of non-Hispanic voters." *Id.* at *86. The District Court also reviewed evidence that while the citizen voting-age population of the Village taken as a whole was 21.9% Latino, alternative single-district plans provided for the creation of at least one district with a Latino citizen voting-age population in excess of 50%. *Id.* at *10, *28-29.

In reaching its decision, the District Court additionally considered evidence of official discrimination and racial appeals in political campaigns. In 2005, the United States and the County of Westchester (in which the Village of Port Chester is located) had entered into a Consent Decree pertaining to language assistance at polling sites in the County. *Id.* at *53. According to one of the experts whose testimony the court reviewed, as measured against the standard set in that Consent Decree, Port Chester failed to provide sufficient Spanish language assistance at polling places for Village Trustee elections held between 2001 and 2006. *Id.* at *54. The court also received "extensive testimony about a flyer . . . that was used as part of the 2007 Mayoral election . . . [that] [w]ithout question, . . . must be considered a racial appeal." *Id.* at *69.

Just two months ago, on April 16, 2008, the Northern District of Ohio issued its order in *United States v. City of Euclid*, Case No. 1:06cv01652 (N.D. Ohio April 16, 2008), setting forth its findings of fact and conclusions of law in support of the extensive oral rulings it had made when it found that the City of Euclid's method of electing its City Council violated Section 2. In that order, the court recited, *inter alia*, the proof of racial bloc voting that had been adduced at trial. This included data relating to elections for City Council in which there had been both African-American and white candidates. In six such contests, the African-American preferred candidate received an average of 76.4% of the votes cast by African-American voters and only an average of 12.78% of the votes cast by white voters. Order at 22. "As a result, despite strong support from African-

American voters, none of the African-American candidates prevailed." *Id.*

The court also recited evidence presented by the Government's expert that it was feasible to create eight single-member councilmanic districts in Euclid that would include two districts in which African-American voters would be a majority, one with 67% and the other with 56% of the voting-age population. Order at 14. Ultimately, the parties presented a remedial plan to the court that provided for the creation of such districts. In March 2008, a special councilmanic election was held. "On that date, for the first time in the City's history, an African-American was elected to the Euclid City Council, having been elected from one of the majority-minority districts established by the remedial plan." Order at 2.

Although the "heart" of the case involved violations of Section 4(e) of the Voting Rights Act, rather than vote dilution claims under Section 2, the District Court's decisions in *United States v. Berks Co.*, 250 F. Supp. 2d 525, 526 (E.D. Pa. 2003) (preliminary injunction), and *United States v. Berks Co.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (permanent injunction), provide powerful recent reminders of the wrongs the Voting Rights Act is intended to address and of its continued vital importance. The case grew out of an investigation conducted by the Department of Justice that focused on election practices in the Berk County, Pennsylvania, City of Reading whose Latino population had doubled in the course of ten years. *Berks*, 250 F. Supp. at 527-528. The majority of that Latino population was comprised of United States citizens of Puerto Rican descent, *id.* at 528, many of whom had been born in

Puerto Rico where, the court noted, the primary language of instruction is Spanish. *Id.*

The court recounted the instances of hostile and unequal treatment of Latino voters that the Government had documented during its investigation. For example, "[p]oll workers turned away Hispanic voters because [the poll workers] could not understand their names, or refused to 'deal' with Hispanic surnames;" "[p]oll workers made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as . . . 'They can't speak, they can't read, and they come in to vote.'" *Id.* at 529. Further, "[p]oll workers placed burdens on Hispanic voters that [were] not imposed on white voters," including requiring "only Hispanic voters to verify their addresses" and provide photo identification. *Id.* The court also noted that there had been a lack of bilingual poll workers and bilingual election materials and recited numerous instances in which voters were not permitted to bring English-speaking assistors of their choice into the polling booth. *Id.* at 529-531. The court ultimately entered a detailed permanent injunction after having made extensive findings of fact and conclusions of law, including with respect to Section 2 of the Act, that "the totality of the circumstances . . . demonstrates that Defendants' practices and procedures result in an electoral system in which Hispanic and Spanish-speaking voters have less opportunity than other members of the electorate to participate in the electoral process." *Berks*, 277 F. Supp. at 581.

The City of Boston also was the subject of recent Voting Rights Act litigation. The Government filed suit in 2005, in the case of *United States v. City of Boston*, Case No. 05-11598-WGY (July 2005),[5] alleging, *inter alia*, that Boston had abridged the rights of Latino, Chinese, and Vietnamese voters by treating them disrespectfully when they sought to exercise their right to vote, refusing to permit limited English proficient Latino and Asian American voters assistors of their choice, and improperly influencing, coercing or ignoring the ballot choices of such voters. Complaint at ¶ 20. The City thereafter entered into a settlement agreement which required it to undertake substantial remedial action, including hiring bilingual election officers to assist Latino, Chinese, and Vietnamese voters, permitting assistors of choice for limited English proficient voters, and training election officers to be respectful and courteous to all voters. Order dated October 18, 2005 in *United States v. City of Boston*, Case No. 05-11598-WGY.[6]

Again, this is but a sample of the many voting rights cases that have been litigated in recent years. In light of the overwhelming evidence that racial polarization, intentional discrimination, and the inability of minorities to elect candidates of their choice still remains a critical problem in the United States, there can be no question that the Act remains of vital importance and must be interpreted in the manner that best effectuates Congress' intent.

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5. The Complaint is available at www.usdoj.gov/crt/voting/sec_203/documents/boston_comp.htm.

6. The Order is available at www.usdoj.gov/crt/voting/sec_203/documents/boston_cd2.htm.

POINT III

THE COURT SHOULD APPLY THE FIRST *GINGLES* PREREQUISITE IN THE MANNER THAT BEST ACHIEVES ITS PURPOSE: TO ESTABLISH THAT MINORITY VOTERS HAVE THE POTENTIAL TO ELECT REPRESENTATIVES OF THEIR CHOICE

When the Court first applied the *Gingles* prerequisites to single-member districts, Justice Scalia, writing for a unanimous Court, stated that the first prerequisite was "needed to establish that the minority has the potential to elect a representative of its own choice. . . ." *Growe v. Emison*, 507 U.S. 25, 40 (1993). That purpose, which is rooted in the language of the Act, is served by the interpretation of the *Gingles* prerequisite that *Amici* urge this Court to adopt.

Amici urge the following standard for the first *Gingles* prerequisite: A minority group asserting a Section 2 vote dilution claim satisfies the first *Gingles* prerequisite when it demonstrates that it constitutes a majority of a proposed district's population. A minority group that constitutes less than 50% of a proposed district's population also satisfies the first *Gingles* prerequisite and may proceed with a Section 2 vote dilution claim if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over votes, it has the ability to elect candidates of its choice.[7]

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7. "Minority coalition" districts, that is, districts in which minority groups have come together in coalition to constitute a

(Cont'd)

Opportunity or potential to elect is the key. "Influence" districts (that is, districts in which a minority group does not have the opportunity to elect candidates of its choice) do not satisfy the requirements of the Voting Rights Act.[8] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577 (2006).

The record in this case clearly establishes that the voting district in issue, North Carolina House District

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(Cont'd)
politically cohesive voting bloc that has the potential to elect candidates of their combined, mutual choice, are not now before the Court. In fact, some courts have allowed minority group coalitions to satisfy the first *Gingles* prerequisite. *See, e.g., Campos v. Baytown*, 840 F.2d 1240, 1244 (1988) (Fifth Circuit allowed African-Americans and Latinos to be combined for purposes of satisfying the first *Gingles* prerequisite so long as the groups could show that they were politically cohesive); *Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526-27 (1990) (in which the Eleventh Circuit stated: "Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner"); and *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S. Ct. 35, 129 L. Ed. 2d 931 (1994) (Second Circuit combined African-Americans and Latinos for purposes of satisfying the first *Gingles* prerequisite).

8. Courts have been inconsistent in their use of the term "influence" district. *Compare Voinovich*, 507 U. S. at 150, with *Georgia v. Ashcroft*, 539 U.S. 461, 474-75 (2003). The MALDEF and AAJC *Amici* understand "influence" district to have the meaning set forth in the text above.

18, is an African-American opportunity district. As explained by the Supreme Court of North Carolina:

> The General Assembly drew House District 18 to meet the requirements of Section 2 of the Voting Rights Act of 1965 . . . Past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates. Accordingly, in the 2003 House redistricting plan, the General Assembly fashioned House District 18 with a total African-American population of 42.89 percent and an African-American voting age population of 39.36 percent. Defendants refer to House District 18 as an "effective black voting district," with a sufficient African-American population to elect representatives of their choice.

Pender Co. v. Bartlett, 649 S.E.2d 364, 366-67 (N.C. 2007). For this Court now to hold that a district like North Carolina's House District 18 meets the first *Gingles* prerequisite is a natural extension of, and consistent with, its prior rulings.

Just one week after it rendered its unanimous opinion in *Growe*, the Court issued a second unanimous Voting Rights Act decision, *Voinovich*, 507 U.S. 146. In *Voinovich*, it cited the holding in *Growe* but then added a note of caution, saying: "Of course, the Gingles factors

cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 158. Although the Court used the term "influence" districts to describe the type of districts that appellees had argued should have been created by the Ohio state apportionment board, *id.* at 150, what it described were opportunity districts: "districts in which black voters would not constitute a majority, but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Id.* The Court assumed for purposes of resolving the *Voinovich* case that such districts would satisfy the first *Gingles* prerequisite but, mindful of its own admonition to eschew mechanical application, went on to observe that the prerequisite would "have to be modified or eliminated," *id.* at 158, were it to be applied to districts like those then in issue.

Amici urge that the Court, having undertaken to explicate further what is required to satisfy the first *Gingles* prerequisite, now modify that prerequisite as follows: a minority group asserting a Section 2 claim should always be able to satisfy the first *Gingles* prerequisite by showing that it is sufficiently numerous to constitute a majority in a single-member district. In addition, a minority group seeking to assert a Section 2 vote dilution claim may also satisfy the first *Gingles* prerequisite by demonstrating that it constitutes a functional majority in a single-member district.

Such modification of the first *Gingles* prerequisite will further the purposes of the Act by providing greater flexibility. "An inflexible rule . . . run[s] counter to the textual command of [Section] 2 . . ." *De Grandy*, 512 U.S. at 1018.

Toward the end of their brief, Petitioners draw parallels to this Court's analysis in *De Grandy* and argue that it is inappropriate to create a "safe harbor" for legislatures that are engaged in redistricting. *Brief of the Petitioners ("Pet. Br.")* at 43-44. That argument does not conflict with the flexible, two prong application of the first *Gingles* prerequisite that *Amici* urge here.

In *De Grandy*, this Court recognized that the "need for . . . 'totality' [of circumstances] review springs from the demonstrated ingenuity of state and local governments in hobbling minority power, a point recognized by Congress when it amended the statute in 1982 . . ." *De Grandy*, 512 U.S. at 1018 (internal citations omitted). Petitioners therefore urge this Court to avoid enunciating a rule that state legislatures could turn into a vehicle to dilute minority voting strength. *Pet. Br.* at 43-44. However, permitting plaintiffs and the Government to continue to satisfy the first *Gingles* prerequisite by demonstrating that minority voters constitute a numerical majority in a proposed Section 2 district (that is, by satisfying the first prong of the modified *Gingles* prerequisite urged here by *Amici*) hardly poses such a risk.

Petitioners also reference certain factual issues that may arise in determining numerical majorities, *Pet. Br.* at 41-43. And the brief of the Persily *Amici*, *Brief for Nathaniel Persily, Bernard Grofman, Theodore Arrington, and Lisa Handley as Amici Curiae on Behalf of Neither Party*, further expands on this subject. *Amici* well recognize that the Census has a history of undercounting minorities and overcounting whites and

that certain data, including citizen voting-age population data, may not be available on as timely a basis as other data. *Amici* also understand that the parties and other *Amici* are seeking guidance in anticipation of redistricting that will be required upon the completion of the 2010 Census. However, the question certified for decision by this Court is considerably more focused. It assumes that a minority group that constitutes 50% or more of a proposed district's population can state a vote dilution claim and now asks if a group that constitutes *less* than 50% can do so as well. The MALDEF and AAJC *Amici* urge this Court to avoid any response to that question which erects any new hurdles for minority voters or the Government asserting a Section 2 vote dilution claim. Minority voters and the Government should continue to be able to state a claim that satisfies the first *Gingles* prerequisite by alleging the existence of a minority group that constitutes 50% of a proposed district's population. Whether that population should be voting-age population, citizen voting-age population or some other metric is not an issue presented by the case before the Court and therefore need not be addressed now. *Amici* suggest that that issue is in any event best determined in particular cases in the context of the "intensely local appraisal" that this Court reaffirmed in *LULAC*, 126 Sup. Ct. at 2620, is "necessary" to the adjudication of Voting Rights Act claims.

CONCLUSION

Amici urge the Court to answer the question presented by holding that a minority group satisfies the first *Gingles* prerequisite in one of two ways: (1) when it constitutes a numerical majority of a proposed district's population or (2) if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over votes, it has the ability to elect candidates of its choice.

Respectfully submitted,

NINA PERALES
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476

LOIS D. THOMPSON
Counsel of Record
MICHAEL J. LEBOWICH
TRAVIS P. BRENNAN
GREGG SALKA
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
(310) 557-2900

TERRY M. AO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 296-2300

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

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(17)

No. 07-689

MOTION FILED
JUN 20 2007

IN THE

Supreme Court of the United States

GARY BARTLETT, *et al.*,

Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CINDY MOORE, MILFORD FARRIOR, MARY JORDAN, AND THE AMERICAN CIVIL LIBERTIES UNION OUT OF TIME AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

PAMELA S. KARLAN
JEFFREY L. FISHER
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

ANITA S. EARLS
Counsel of Record
SOUTHERN COALITION FOR SOCIAL JUSTICE
115 Market Street, Suite 470
Durham, NC 27701
(919) 323-3380

THOMAS C. GOLDSTEIN
AKIN, GUMP, STRAUSS, HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

LAUGHLIN MCDONALD
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303

STEPHEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for Amici Curiae

605879 2P

A motion is being made herewith to file out of time a Brief of Amici Curiae National Association for the Advancement of Colored People, Cindy Moore, Milford Farrior, Mary Jordan, and The American Civil Liberties Union in Support of Petitioners.

This brief was submitted in a timely fashion to the printer who inadvertently neglected to file same on June 17, 2008, the due date. We relied upon a U.S. Supreme Court printer who, until now, had an unblemished record for timely filings.

The Respondent has consented to the late filing of this brief.

Respectfully submitted,

ANITA S. EARLS
Counsel of Record
SOUTHERN COALITION FOR
SOCIAL JUSTICE
115 Market Street, Suite 470
Durham, NC 27701
(919) 323-3380

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BRIEF FOR AMICI CURIAE

INTEREST OF AMICI CURIAE[1]

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization. The NAACP has affiliates and members nationwide, including over 100 branches with more than 20,000 members in North Carolina. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. Since its founding, the NAACP has been involved in litigation on behalf of minority voters as well as in the legislative efforts that culminated in the passage, amendment, and extension of the Voting Rights Act of 1965. This Court has long recognized the NAACP's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The experience of the NAACP and its affiliates and members in litigating cases under Section 2 of the Voting Rights Act shows why the North Carolina Supreme Court's construction of Section 2 was incorrect.

The individual *amici* – Cindy Moore, Milford Farrior, and Mary Jordan – are African American citizens, residents, and voters living in Pender County, North Carolina, and North Carolina House District 18, the district at issue in this case. They are members of various civic and social organizations

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

that sponsor voter registration and voter education efforts in the African-American community. Under the 2003 redistricting plan at issue in this case, they were able to elect a representative of their choice to the North Carolina General Assembly from House District 18, a representative who is familiar with, and responsive to, the needs of their community. If the decision of the North Carolina Supreme Court were to be upheld, however, they would be denied the ability to elect such a representative.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that goal, the ACLU has long been active in defending the equal right of racial and other minorities to participate in the electoral process. The ACLU has appeared before this Court in numerous voting cases over the years, including those seeking to enforce the provisions of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984), *Rogers v. Lodge*, 458 U.S. 613 (1982), *Hunter v. Underwood*, 471 U.S. 222 (1985), *Holder v. Hall*, 512 U.S. 874 (1994), and *Abrams v. Johnson*, 521 U.S. 74 (1997), both as counsel for parties and as amicus curiae. The ACLU of North Carolina is a statewide affiliate of the national ACLU.

INTRODUCTION

The question presented in the petition for certiorari is phrased as "[w]hether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973." Pet. i. While *amici* believe that such claims can be brought against jurisdictions whose failure to

create such "coalitional districts"[2] results in minority voters "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" – the touchstone of a Section 2 violation, 42 U.S.C. § 1973(b) – this Court need not resolve that question as an abstract proposition to decide this case in petitioners' favor.

This case involves not a state's failure to create a coalitional district, but rather a challenge to a specific coalitional district that a State voluntarily created in an effort to comply with Section 2. The North Carolina General Assembly drew that coalitional district – House District 18 – to continue providing minority voters who had previously lived in a majority-black state legislative district with an equal opportunity to elect a legislator of their choice. As this Court explained in its foundational Section 2 decision, *Thornburg v. Gingles*, 478 U.S. 30 (1986) – itself a case involving North Carolina state legislative districts – applying Section 2 demands "a searching practical evaluation of the past and present reality" within the relevant jurisdiction, 478 U.S. at 79 (quoting S. Rep. No. 97-417, p. 30 (1982)). "This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact" of the relevant electoral practices." *Id.* (internal quotation marks and citations omitted).

As the facts in this case illustrate, Pender and New Hanover Counties originally were a single county, divided into two counties as part of an explicit and intentional plan to dilute the voting strength of newly enfranchised black voters in 1875. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (intentionally

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[2] This phrase comes from the Court's opinion in *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (describing "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice").

carving black voters out of a jurisdiction violates Fifteenth Amendment). Since the state originally created two counties to divide an effective black voting population, and now wants to allow that population to remain united in a coalitional district for legislative elections, the district should be protected by the Voting Rights Act.

However, instead of conducting a fact-specific and local appraisal, the North Carolina Supreme Court adopted a categorical rule that the "whole county provision" (WCP) of the North Carolina Constitution, art. II, § 5(3)[3] should trump all efforts to comply with Section 2 unless those efforts can culminate in the creation of a district in which a majority of the citizens of voting age are black. Rigid application of that rule, in light of the past and present reality of voting rights in this region of North Carolina, threatens to undo the significant but incomplete progress the State has made in providing all its citizens with the right to participate in the political process and elect representatives of their choice.

SUMMARY OF ARGUMENT

The whole county provisions of the North Carolina Constitution should not be permitted to bar the state's use of coalitional districts to provide its long-excluded minority voters with an equal opportunity to elect legislators of their choice. The whole county provisions themselves are an aspect of the State's long history of racial discrimination impairing minority citizens' right to vote and elect their preferred candidates to office.

In an important sense, House District 18 reflects significant progress in overcoming that sad history. While levels of racial bloc voting within the district remain high, it is now possible for black voters to elect a representative of their choice.

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[3] A parallel whole county provision applies to state senatorial districts. N.C. Const., art. II, §3(3).

The wisdom of rejecting the North Carolina Supreme Court's rigid rule is further illustrated by other coalitional districts in North Carolina, including the congressional district at issue in *Easley v. Cromartie*, 532 U.S. 234 (2001). If the whole county provisions of state law were to preclude adopting such districts in areas where minority voters will otherwise be excluded from effective participation in the political process, then those provisions themselves would violate Section 2.

More generally, absent the presence of a substantial number of coalitional districts, North Carolina would soon revert to having a virtually all-white legislature. If this Court were to affirm the North Carolina Supreme Court's holding that black voters are entitled to no consideration of their interests unless they can show that it is possible to draw districts that are majority-black with respect to citizens of voting age, it would implicitly invite the abandonment of the districts that have finally provided black North Carolinians with representation of their choice.

ARGUMENT

I. House District 18 Gives Black Voters in New Hanover and Pender Counties the Ability to Participate Equally in the Political Process and to Elect a Representative of Their Choice.

For most of its history, North Carolina denied its black citizens the right to participate fully in its political processes and to elect representatives of their choice. Sometimes, this denial was purposeful. Other times, while unintentional, this denial violated Section 2 of the Voting Rights Act. Only in the last two reapportionment cycles did black voters in New Hanover and Pender Counties, the counties that constitute House District 18, finally achieve the ability to participate effectively in state legislative elections.

A. North Carolina Has an Extensive History of Racial Discrimination Touching the Right To Vote, and Particularly Diluting the Voting Strength of Black Residents of New Hanover and Pender Counties.

1. This Court is well acquainted with the barriers to full political participation in state legislative elections that North Carolina's black citizens have faced. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court relied on extensive findings of past and continuing discrimination, as well as pervasive racial bloc voting in the challenged districts, to conclude that the state's use of multimember house districts and the way in which it drew a state senate district violated the rights of minority voters under Section 2 of the Voting Rights Act. *See id.* at 39-41.

While some of this Court's findings in *Gingles* were specific to those districts, many of them implicated the voting rights of black citizens across the state. For example, North Carolina had officially discriminated against blacks from 1900 to 1970 through the use at different times of a poll tax, a literacy test, a prohibition against single shot voting, and designated seats for multi-member districts. *See id.* at 38-39. Black voter registration was depressed and was traceable "to the historical pattern of statewide official discrimination." *Id.* at 39. There was also a statewide history of discrimination with respect to education, housing, employment, and health services which resulted in a lower socioeconomic status for blacks. This lower status both created "special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice." *Id.* The state also used other voting procedures "that may operate to lessen the opportunity of black voters to elect candidates of their choice," such as a majority vote requirement for primary elections and the lack of a subdistrict residency requirement for members of the General Assembly elected from multi-member districts. *Id.* White candidates for public office "encouraged voting along racial lines by appealing to

racial prejudice," a tactic that "persists to the present day," including in the 1984 campaign for a seat in the United States Senate. *Id.* at 40.

In light of all these factors, it was entirely foreseeable that the districts at issue in *Gingles* "exhibit[ed] severe and persistent racially polarized voting." *Id.* at 41. It was the interaction of that racially polarized voting with the configuration of the challenged districts that gave rise to liability under Section 2.

2. In the wake of *Gingles*, jurisdictions across North Carolina changed their election practices on the basis of either judicial findings or concessions that voting was racially polarized and that as a result, current electoral district boundaries impermissibly diluted minority voting strength. For representative cases see *Ward v. Columbus County*, 782 F.Supp. 1097, 1102 (E.D.N.C. 1991) (invalidating at-large elections; finding "racial appeals" in elections and that "racial bloc voting has been extreme and persistent among the white voters" in county adjacent to Pender County); *see also, Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993); *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991); *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988); *NAACP v. City of Statesville*, 606 F.Supp. 569 (W.D.N.C. 1985); *Johnson v. Halifax County*, 594 F.Supp. 161 (E.D.N.C. 1984); *Harry v. Bladen County*, 1989 WL 253428 (E.D.N.C. 1989); *Wilkins v. Board of Comm'rs*, No. 93-12-CIV-2-BO (E.D.N.C. 1995); *Fussell v. Town of Mount Olive*, Civ. No. 93-303-CIV-5-D (E.D.N.C. 1995); *Speller v. City of Laurinburg*, No. 3:93 CV 365 (M.D.N.C. 1994); *Rowsom v. Tyrell County Comm'rs*, No. 93-33-CIV-Z-D (E.D.N.C. 1994); *Lewis v. Wayne County Bd. of Educ.*, Civ. No. 91-165-CIV-5-H (E.D.N.C. 1992); *Daniels v. Board of Comm'rs*, Civ. No. 89-137-CIV-4-H (E.D.N.C. 1990); *Hall v. Kennedy*, Civ. No. 88-117-CIV-3 (E.D.N.C. 1989); *Patterson v. Siler City*, Civ. No. C-88-701-D (M.D.N.C. 1989); *United States v. Sampson County*, Civ. No. 88-121-CIV-3 (E.D.N.C. 1989); *Green v.*

City of Rocky Mount, No. 83-81-CIV-8 (E.D.N.C. 1984),. *See generally*, Anita S. Earls, et al, *Voting Rights in North Carolina, 1982-2006*, 17 Rev. L. Soc. Just. 575, 593-640 App. B (2008) (summarizing voting rights cases); William R. Keech and Michael P. Sistrom, *North Carolina*, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1900, 155-190 (Chandler Davidson and Bernard Grofman eds. 1994).

3. Black citizens of New Hanover and Pender Counties were, of course, subject to all of the statewide practices and conditions identified by this Court in *Gingles*, such as the history of official discrimination touching the right to vote and the presence of electoral practices that enhanced the dilutive impact of at-large elections. The three-judge state court in this case concluded that black citizens in Pender and New Hanover Counties, "were victims of racial discrimination." App. to Pet. Cert. 113a. They remain at a disadvantage compared to whites "with regard to income, housing, education, and health which hindered their ability to participate effectively in the political process and elect representatives of their own choosing." *Id.* at 114a. As discussed *infra*, Section I.B., they bear the brunt of significant racial bloc voting. In addition, however, the region has its own distinct, and distinctively troubling, history of discrimination impairing black citizens' political participation.

The very genesis of Pender County lies in intentional discrimination against black voters. Originally part of New Hanover County, Pender County was created in 1875 as a result of racially infected Reconstruction politics. At that time, Republicans allied themselves with African American populations and were able to control the city of Wilmington and New Hanover County. Conservatives in the General Assembly, however, "sought to isolate the influence of Republicans and African Americans in New Hanover County by taking the northern two-thirds of the county" and forming Pender County. J.A. 144. By separating the African American and Republican coalition, conservatives effectively eliminated the African American population's ability to elect

their candidate of choice and eventually gained control of Pender County. The North Carolina Supreme Court ignores the fact that, but for this racially tainted splitting of New Hanover County, House District 18 would not even implicate the whole county provision.

In 1898, the Democratic Party undertook a white-supremacy political campaign to seize control from the Fusionists, whose legislative programs were favorable to African Americans. "This campaign, characterized by blatant racist appeals by pamphlet and cartoon, aided by acts of outright intimidation, succeeded in restoring the Democratic Party to control of the legislature in 1898." *Gingles v. Edmisten*, 590 F.Supp. 345, 359 (E.D.N.C. 1984). In 2006, an official commission examined the events of 1898. It described the Democratic Party's victory as the product not only of racialized campaign tactics and ballot-box stuffing in a majority-black precinct but also of intimidation that deterred black citizens from registering to vote by threatening them with losing their jobs or physical attack if they sought to register. *See* Wilmington Race Riot Commission, Final Report (May 31, 2006), available at http://www.ah.dcr.state.nc.us/1898-wrrc/report/report.htm (last visited June 15, 2008). The day after the election, the Democratic Party passed resolutions requiring the mayor and chief of police to resign. Whites took up arms and began shooting African Americans on the street. Ultimately the violence led to the deaths of an unknown number of African Americans in Wilmington and a mass exodus of over 2,100 individuals in what was mislabeled for over a century as a race riot. In 2006, an official commission concluded that the event was in actuality a coup d'etat that "spurred the subsequent development of statutory basis for segregation (i.e., Jim Crow) and disfranchisement legislation in North Carolina." *Id.* at 5.

On March 6, 1899, the North Carolina legislature ratified "An Act to Restore Good Government to the Counties of North Carolina." It was designed to "solidify Democratic control

over county governments statewide." *Id.* at 208. The act applied to New Hanover and twelve other counties, primarily those with African American majorities or near majorities. "The law removed the election of the county commissioners from the popular vote and placed the responsibility with justices of the peace appointed by the General Assembly." *Id.*

More recently, this region of the state has been the site of continuing discrimination affecting the ability of African Americans to participate equally in the political process. In 1971, two years after desegregation of Wilmington's high schools, nine African American men and one white woman (referred to as the "Wilmington Ten") were charged and eventually convicted of felonious burning of property and conspiracy to assault emergency personnel at the scene of the burning. At the time, there was an "atmosphere of tension, anxiety, and stress that existed" as black and white students adjusted to the interracial schooling. J.A. 105-06. The incident became internationally known when allegations arose that evidence against the Wilmington Ten had been fabricated. In 1980, the convictions were reversed. *See Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).

In 1972, Pender County was one of the 19 counties on which the state imposed an Anti-Single Shot Law (North Carolina General Statutes §§ 163-151(2)(d) and 163-151(3)(b)). That law was successfully challenged by African-American voters as unconstitutional because "the legislature wished to blunt the voting strength of Negroes in the counties to which the law applies." *Dunston v. Scott*, 336 F.Supp. 206, 212 (E.D.N.C. 1972).

4. Black voters in New Hanover and Pender Counties did not have the opportunity to elect the state legislator of their choice until the 1990's. Following the 1990 census, the State redrew the state legislative boundaries. Because thirty-four counties in North Carolina are covered by the special preclearance provision of Section 5, 42 U.S.C. § 1973c, *see* 28

C.F.R. Part 51 Appendix (2007),[4] the state submitted its legislative redistricting plan to the Department of Justice. The Attorney General interposed an objection to the state's 1991 plan because of the existence of racially polarized voting and because boundary lines did not fairly recognize minority voting strength. One area of the state where the Attorney General found that the plan appeared "to minimize black voting strength" was the southeast, containing Pender, New Hanover, and six other counties. Letter from John R. Dunne, Assistant Attorney General, to Tiare B. Smiley, December 18, 1991. The plan, he concluded, appeared "to manipulate black concentrations in a way calculated to protect white incumbents," and "submerges concentrations of black voters in several multimember, white majority districts." *Id.*; *see* J.A. 68.

In response, the legislature adopted a revised redistricting plan in 1992 that received preclearance. That plan required, among other things, splitting some precincts in order to fairly reflect black voting strength. Among the districts created by that plan was one denominated House District 98, which included portions of New Hanover and Pender Counties. *See id.* That district was a majority-minority district; House District 18 is the successor to that district drawn after the 2000 census.

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[4] Neither New Hanover nor Pender County is a covered jurisdiction.

B. Despite the Continued Presence of Significant Racial Bloc Voting, House District 18 Gives Black Voters in New Hanover and Pender County the Ability to Elect a Representative of Their Choice.

The parties agree that elections within House District 18 continue to exhibit significant racial bloc voting. See App. to Pet. Cert. 9a.[5]

Nonetheless, black voters in House District 18 have succeeded in electing the candidate of their choice. This is because racial bloc voting, while still significant both practically and legally, has diminished enough to enable candidates preferred by the black community to attract a level of white crossover voting sufficient to win elections.

A central reason for this salutary development lies in the fact that since the time of *Gingles*, North Carolina has become a two-party state. House District 18 has a total population that is 42.89% black and a voting age population that is 39.36% black. App. to Pet. Cert. 46a. But black voters form a majority (53.72%) of Democratic registered voters in the district. App. to Pet. Cert. 46a. Black voters are thus able to nominate the candidate of their choice in the primary. That candidate is then able to run in the general election with major party support. At the 2004 election held under the challenged plan, the candidate of choice of minority voters was in fact reelected. *Id.*

That black voters can elect their candidate of choice from House District 18, however, does not mean that they would be able to elect their candidate of choice absent that district. As the North Carolina Supreme Court recognized, "[p]ast election results in North Carolina demonstrate that a legislative voting

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[5] In addition, there was uncontested evidence in the record below that voting in Pender County continues to be racially polarized. A report prepared by Richard Engstrom, Ph.D., indicated that "analysis of recent elections in both Pender and New Hanover Counties in which voters have been faced with a biracial choice of candidates reveal racially polarized voting." J.A. 122 (Engstrom Report ¶ 12).

district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates." App. to Pet. Cert. 5a. House District 18 satisfies that standard, but by a relatively narrow margin. It would be impossible to draw a district without splitting New Hanover and Pender Counties that would have sufficient numbers of black voters for the minority community anywhere in southeastern North Carolina to elect its legislator of choice.

II. The Whole County Provision Is Itself a Practice That Raises Serious Concerns Under the Voting Rights Act.

The reason the North Carolina Supreme Court gave for requiring the reconfiguration of House District 18 was its failure to fully satisfy the whole county provision. It would be bad enough if an entirely neutral state practice posed a barrier to achievement of full political equality for minority voters. It would be even worse if a state practice that has been suspended in significant parts of the state precisely because of its discriminatory consequences were to deprive black voters in House District 18 of the ability they now enjoy to elect the candidate of their choice.

The Department of Justice has interposed 63 objections to voting changes submitted by North Carolina and its political subdivisions from March 17, 1971, to June 25, 2007, 46 of which were entered from 1982 forward. *See* http://www.usdoj.gov/crt/voting/ sec_5 /nc_obj2.htm (last visited June 15, 2008). A number of these objections are connected to North Carolina's attempts to impose a whole county provision or its close analog, a whole precinct provision.

In 1968, North Carolina adopted amendments to its constitution, H.B. No. 471 (1967), which provided that no county could be divided in the formation of a senate or house district. When that amendment was finally submitted for

preclearance, the Department of Justice interposed an objection. The objection was based upon the fact that the whole county provision led to the use of large multi-member districts which, given "the racial bloc voting that seems to exist," would submerge "cognizable minority population concentrations into larger white electorates." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex Brock, November 30, 1981.[6]

Subsequently, on December 7, 1981, the department objected to a proposed senate redistricting plan because the whole county concept had resulted in the submergence of cognizable black communities into large, predominantly white, multi-member districts. The department was unable to conclude that the plan "is free of a racially discriminatory purpose or effect." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex Brock, December 7, 1981.[7]

The following year, the department objected to a reapportionment plan for the North Carolina house on similar grounds that the state had applied the whole county concept and that "the use of large multi-member districts effectively submerges sizeable concentrations of black population into a majority white electorate." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex K. Brock, January 20, 1982. The department concluded that the state

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[6] As the letter provided: "In the present submission . . . we are evaluating a legal requirement that every county must be included in the plan as an undivided whole. As noted above, the inescapable effect of such a requirement is to submerge sizeable black communities in large multi-member districts." Letter of November 30, 1981.

[7] At the same time, the Department also objected to a proposed congressional redistricting plan because District 2, "the only district where blacks could have the potential for electing a candidate of their choice," had been drawn in a "strangely irregular" shape to exclude a politically active black community and had reduced the black population to 36.7% compared to 40.2% in the preexisting plan. *Id.*

failed to carry its burden of showing that the proposed plan "is free of a racially discriminatory purpose and effect." *Id.*

In 1995, despite the fact that the state split some precincts in its 1992 redistricting plan to draw districts that fairly reflected minority voting strength, *see* J.A. 68, the General Assembly passed a law, Chapter 355 (1995), patterned after the whole county provision, that prohibited state legislative and congressional district boundaries from crossing voting precinct lines. The Department of Justice objected to the new law because it would make it more difficult to draw majority black districts and because it was evident the law was adopted with "a racially discriminatory purpose." Letter from Loretta King, Acting Assistant Attorney General, to Charles M. Hensey, February 13, 1996.

In 2002, the Department of Justice withdrew its objection to the whole county provision. It did so because the state supreme court had given the WCP a new construction in *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), that "could be harmonized with the requirements of the Voting Rights Act [VRA] so as to overcome concerns expressed in the November 30, 1981, objection." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Knox V. Jenkins, Jr., July 12, 2002. The withdrawal letter quoted *Stephenson*, 562 S.E.2d at 396, that "the WCP may not be interpreted literally because of the VRA and 'one-person, one-vote' principles," but that "[f]ederal law . . . preempts the State Constitution only to the extent that the WCP actually conflicts with the VRA and other federal requirements relating to state legislative redistricting." Letter of July 12, 2002. The withdrawal letter further quoted *Stephenson*, 562 S.E.2d at 391 n.4, "that complete compliance with federal law is the first priority before enforcing the WCP." The department concluded that "the burden of the State under Section 5 has been met with regard to Chapter 640 (1967), as construed in *Stephenson*." Letter of July 12, 2002.

Even after the withdrawal letter, use of the whole county provision in a covered portion of the state would remain illegal if it violated or conflicted with Section 5. So, for example, if the state were to redraw a legislative district that included part of a covered county to avoid splitting counties and, as a result, there was a retrogression in minority voting strength, that use of the whole county provision would prompt a new Section 5 objection. *Cf. Beer v. United States*, 425 U.S. 130 (1976); Letter of December 7, 1981 (objecting to a congressional district because the black population had been reduced from 40.2% in the preexisting plan to 36.7% in the proposed plan).

But under the North Carolina Supreme Court's interpretation of Section 2, use of the whole county provision in the remainder of the state would be immune from challenge, even if it too eliminated a district from which black voters had previously been able to elect the candidate of their choice. While this Court has cautioned that liability under Sections 2 and 5 cannot mechanically be equated, *see Georgia v. Ashcroft*, 539 U.S. 461, 477-79 (2003), in this situation they would reflect overlapping concerns.

III. Coalitional Districts Are Critical to Providing North Carolina's Black Citizens an Equal Opportunity to Elect Candidates of their Choice and Section 2 Should Be Construed to Recognize the Role These Districts Play.

Upon his departure from Congress in 1901, George White, a black Republican from Tarboro, North Carolina, announced that "[t]his is perhaps the Negro's temporary farewell to Congress." Michael Barone with Richard E. Cohen, eds., *The Almanac of American Politics* 1225 (2003). History proved him correct. It was not until 1991, almost a century later, when Melvin Watt and Eva Clayton were elected from two majority black districts, that North Carolina voters again sent an African American to Congress. Watt's 12th District was 57% black, and it became a lightning rod for challenges by white voters.

The constitutionality of its boundaries was considered by this Court no less than four times. *See Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Easley v. Cromartie*, 532 U.S. 234 (2001). As a result of that litigation, District 12 was redrawn in 1997, not as a majority-black district but as a district with a total black population of 47% and a black voting age population of 43%. Blacks were 46% of the registered voters. *Hunt v. Cromartie*, 526 U.S. at 544. Despite that reduction in black population, Representative Watt continued to be elected based on the power of incumbency and the support of white voters in his heavily urban district. Under the North Carolina Supreme Court's construction of Section 2, however, the state would be permitted to redraw District 12 at its discretion, free and clear of Section 2's constraints.

A similar situation obtains at the state legislative level in North Carolina as well. Today, seven African Americans serve in the North Carolina senate. While all of them represent districts with significant black populations, none of them serves a district that has a black majority in voting age population. And eleven African American members of the North Carolina house represent districts that range from 39.36 to 49.97% black in voting age population. To be sure, even with this decrease in racially polarized voting, black voters have not achieved proportionality: While African Americans are approximately 20% of the voting age population in North Carolina, they are able to elect candidates of their choice in only 14% of the state's senate districts and 16% of the state's house districts. But this level of progress was achieved only because the state has drawn districts with significant black populations. Black voters who have been assigned to districts with smaller minority populations remain unable to elect the representatives of their choice. Under the rigid 50 percent rule adopted by the state court, the state would be free under Section 2 to eliminate all these districts and thus relegate

African Americans to token representation in the North Carolina General Assembly.

Such a result would be neither compelled by the text of Section 2 nor required by this Court's decisions. In *Gingles* itself, not only did this Court require that Section 2 claims be assessed under "the totality of circumstances," 478 U.S. at 79 (quoting 42 U.S.C. § 1973(b)), which includes looking at "the facts of each case" and conducting a "searching practical evaluation of the past and present reality" within the relevant jurisdiction, *id.* (internal quotation marks omitted, citing S. Rep. No. 97-417 p. 30 (1982)), but it declined to adopt the bright line rule for vote dilution claims propounded by the North Carolina Supreme Court here. *See id.* at 46 n.12. *See also id.* at 91 n.1 (O'Connor, J., concurring in the judgment) (stating that "if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice").

Decisions of the Court subsequent to *Gingles* have similarly declined to adopt a bright line test for proof of the first *Gingles* factor, or assumed that it would not apply. *See Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) (declining to adopt a bright line test for geographic compactness); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming *arguendo* that a group would state a claim under Section 2 if it were "a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority"); *Johnson v. DeGrandy*, 512 U.S. 997, 1009 (1994) ("we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied"); *LULAC v. Perry*, 126 S. Ct. 2594, 2624 (2006)

("we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population") (Kennedy, J., plurality opinion); *id.* at 2651 (Souter & Ginsburg, JJ., concurring in part and dissenting in part) (arguing that the Section 2 claim challenging the dismantling of a coalitional district should be returned to the district court for reconsideration "untethered by the 50% barrier"); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting in part) (agreeing that "the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory dilution inquiry").

To be sure, not every minority community will be able to obtain an order from a federal court requiring that the state draw a coalitional district. This Court's decisions in cases like *Johnson v. DeGrandy*, 512 U.S 997 (1994), and the *Shaw* cases mean that a state is not required to maximize the number of districts from which minority voters elect their preferred candidates and may be affirmatively prohibited from purposefully drawing a coalitional district that flouts traditional districting principles such as contiguity and compactness. But surely in a case where the district at issue raises problems under state law only because it contains pieces of two counties that were split from one another at the end of Reconstruction for the very purpose of diluting minority voting strength, Section 2 can properly be construed to protect that coalitional district. Holding that the North Carolina General Assembly was complying with Section 2 when it drew House District 18 to preserve the already realized ability of black voters to elect a candidate of choice raises no difficult questions.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

PAMELA S. KARLAN
JEFFREY L. FISHER
Stanford Law School
Supreme Court Litigation
Clinic
559 Nathan Abbott Way
Stanford, CA 94305

ANITA S. EARLS
Counsel of Record
Southern Coalition for Social
Justice
115 Market Street, Ste. 470
Durham, N.C. 27701
(919) 323-3380

THOMAS C. GOLDSTEIN
Akin, Gump. Strauss, Hauer
& Feld, LLP
1333 New Hampshire Ave. NW
Washington, D.C. 20036

LAUGHLIN MCDONALD
American Civil Liberties
Union Foundation
2600 Marquis One Tower
245 Peachtree Center Ave.
Atlanta, GA 30303

STEPHEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

GARY BARTLETT, Executive Director of the North Carolina State Board of Elections, et al.,

Petitioners,

v.

DWIGHT STRICKLAND, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, HANS A. VON SPAKOVSKY, PROJECT 21, ABIGAIL THERNSTROM, AND KARL S. BOWERS, JR., IN SUPPORT OF RESPONDENTS

RALPH W. KASARDA
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Pacific Legal Foundation, Center for Equal Opportunity, Hans A. von Spakovsky, Project 21, Abigail Thernstrom, and Karl S. Bowers, Jr.

QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), Hans A. von Spakovsky, Project 21, Abigail Thernstrom and Karl S. Bowers, Jr., submit this brief amicus curiae in support of Respondents.[1]

Pacific Legal Foundation was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF submits this brief because it believes its public policy perspective and litigation

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *League of United Latin Am. Citizens v. Attorney Gen. of Texas*, 501 U.S. 419 (1991), and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the recent reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Hans A. von Spakovsky is a former member of the Federal Election Commission. He served for three

years as the Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice where he provided advice and legal counsel on enforcement of federal voting statutes including the Voting Rights Act. He is also a former member of the Fulton County Registration and Election Board, which was responsible for administering elections in the largest county in Georgia.

Abigail Thernstrom is a senior fellow at the Manhattan Institute in New York, vice-chair of the U.S. Commission on Civil Rights, and former member of the Massachusetts State Board of Education. She also serves on the board of advisors of the U.S. Election Assistance Commission. She testified twice at the 2006 Senate Hearings for the reauthorization of the Voting Rights Act. She is a recipient of the prestigious 2007 Bradley Prize for Outstanding Intellectual Achievement. Her 1987 book, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press, 1987), won four awards, including the American Bar Association's Certificate of Merit and the Anisfield-Wolf prize for the best book on race and ethnicity. It was named the best policy studies book of that year by the Policy Studies Organization (an affiliate of the American Political Science Association), and won the Benchmark Book Award from the Center for Judicial Studies. She is completing a forthcoming book: *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Representation* (American Enterprise Institute Press, 2009).

Karl S. Bowers, Jr., served as Special Counsel for Voting Matters with the U.S. Department of Justice. As Voting Counsel, Mr. Bowers oversaw the activities

of the Voting Section of the Civil Rights Division, and he provided legal and policy counsel on federal election law matters to senior officials in the Justice Department. He is also a former Chairman of the South Carolina State Election Commission. Mr. Bowers is currently a partner in the law firm of Nelson Mullins Riley & Scarborough, and focuses on public policy matters, including election and voting law, campaign finance law, governmental relations, and legislative and regulatory matters.

Amici Curiae have a substantial interest in limiting or eliminating the use of race as a factor in redistricting, and contend that Section 2 of the Voting Rights Act does not authorize redistricting in cases where the racial minority does not constitute more than 50% of a proposed district's population.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to consider whether the current race-conscious configuration of North Carolina House District 18 is required by Section 2 of the Voting Rights Act of 1965 (the Act), or whether this racial gerrymandering violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Based upon data from the 2000 census, North Carolina determined that an ideal single-member state House district holds 67,078 citizens. *Pender County v. Bartlett*, 361 N.C. 491, 494, 649 S.E.2d 364, 366 (2007). According to that census, Pender County had 41,082 residents, and neighboring New Hanover County had 160,307 residents. *Id.* Combining these two counties provided the population for approximately three House

districts. But rather than creating congressional district lines in compliance with state law to ensure cohesive communities, the General Assembly split Pender County along racial lines. One new district, House District 18, was created to have an African-American voting age population of 39.36%. *Id.* at 494-95, 649 S.E.2d at 366-67.

On May 14, 2004, five Pender County commissioners, in their official capacity and as individuals, sued several North Carolina state officials,[2] alleging that the House redistricting plan violated the Whole County Provision of the state constitution.[3] The state officials answered that this race-conscious redistricting was required by Section 2 of the Act. *Id.* at 495, 649 S.E.2d at 367. A three-judge panel of the North Carolina Superior Court entered summary judgment against Pender County, and the County appealed.

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[2] The defendants are the Executive Director and members of the North Carolina Board of Elections, the then co-Speakers of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Attorney General, and the Governor of the State of North Carolina. *Pender County*, 361 N.C. at 495, 649 S.E.2d at 367.

[3] In carving out the new district, the North Carolina General Assembly split the voters of Pender County to form two new districts with voters from neighboring Hanover County. *Pender County*, 361 N.C. at 494, 649 S.E.2d at 366. Fracturing Pender County in this way violates the Whole County Provision (WCP) of the North Carolina Constitution, which provides "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," N.C. Const. art. II, § 5(3). *See Pender County*, 361 N.C. at 510, 649 S.E.2d at 376 ("House District 18 fails to comply with the WCP.").

The North Carolina Supreme Court, relying on *Thornburg v. Gingles*, 478 U.S. 30 (1986), reversed the three-judge panel. *Gingles* set forth three preconditions a plaintiff must demonstrate in order to establish that a legislative district is required to be drawn to comply with Section 2. The first precondition requires a showing that the minority population is "sufficiently large and geographically compact to *constitute a majority* in a single-member district." *Id.* at 50 (emphasis added). The North Carolina Supreme Court, and almost every other court to rule on this issue, holds that the minority group must comprise a majority of voting age citizens in the proposed district to make out a Section 2 claim. Because the African-American voting age population in House District 18 is not in the majority, the redistricting does not meet the first *Gingles* precondition.

Amici Curiae urge this Court to affirm the holding of the North Carolina Supreme Court as it interprets *Gingles*. Neither the plain language of Section 2, nor its legislative history, provides authority for granting to a bi-racial coalition a statutory right to have its preferred candidate win district elections. Interpreting Section 2 as mandating redistricting in this manner requires the elimination of the first *Gingles* precondition. The result is the granting of racial preferences—not to remedy past or present discrimination, but only to ensure that one political party prevails over another. Such an interpretation is at odds with the language and historical meaning of the Act, creates severe practical problems, and exponentially expands the use of racial considerations in redistricting, thereby also increasing exponentially the constitutional problems raised by Section 2.

ARGUMENT

I

SECTION 2 OF THE ACT PROVIDES NO AUTHORITY FOR VOTE DILUTION CLAIMS BASED UPON COALITION, CROSSOVER, OR INFLUENCE DISTRICTS

The fundamental issue in this case is determining when a new voting district must be drawn to satisfy Section 2 of the Act. Subsection 2(a) prohibits all states and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. 42 U.S.C. § 1973(a); *Gingles*, 478 U.S. at 43. Subsection 2(b) establishes that a violation occurs where the "totality of the circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *Gingles*, 478 U.S. at 43.

Courts recognize at least four distinct types of legislative districts: (1) "majority-minority" districts, (2) "coalition" districts, (3) "crossover" districts, and (4) "influence" districts. *Pender County*, 361 N.C. at 502, 649 S.E. 2d at 371. A majority-minority district is one "in which a majority of the population is a member of a specific minority group." *Voinovich v.*

Quilter, 507 U.S. 146, 149 (1993). Majority-minority districts are often called "safe" districts for the minority, because the minority group voters can vote as a bloc to elect the candidates of their choice without relying on voters of other races. In the three other types of legislative districts, however, the predominant minority group cannot consistently elect its candidate of choice without the assistance of other racial groups.

A coalition district is one in which a minority group joins with voters from at least one other minority group to elect a candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). In a crossover district, a minority group has support from a limited but reliable number of white crossover voters. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 376 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997 (2004). Finally, an influence district is one in which a minority group is large enough to influence the election of candidates, but too small to determine the outcome. *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003).

When a voting district must be created pursuant to Section 2, the Act's plain language and legislative history conclusively establish that such a district can only be a majority-minority district. Congress recently clarified that Section 5 of the Voting Rights Act requires majority-minority districts, and Section 2 should be interpreted consistently with Section 5 in this respect. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 71 (2007) ("Influence districts . . . no longer count in assessing retrogression.).

A. The Plain Language and Legislative History of Section 2 Provide No Support for Vote Dilution Claims Based Upon Coalition, Crossover, or Influence Districts

Minority voters must constitute a numerical majority in a district before they can claim that a challenged practice deprives minority voters of the ability to elect the candidates of their choice, *Gingles*, 478 U.S. at 50, because "black voters in . . . influence districts" cannot "dictate electoral outcomes independently." *Voinovich*, 507 U.S. at 154.

The Sixth Circuit conducted the following analysis in regard to coalition districts:

> If Congress had intended to sanction coalition suits, the statute would read "participation by members of *the classes* of citizens protected by subsection (a)" or more simply, "participation by citizens protected by subsection (a)." Moreover, the central element necessary to establish a violation is a showing that "*its* members have less opportunity than other members of the electorate," 42 U.S.C. § 1973(b) (emphasis added), not that "*their* members have less opportunity." Finally, Congress declared in subsection (b) that "[t]he extent to which members of a *protected class* have been elected" is one circumstance which may be considered. *Id.* (emphasis added). As in prior instances, if Congress had intended to authorize coalition suits, the phrase would more naturally read: "[t]he extent to which

> members of the *protected classes* have been elected." (Citation omitted.)

Nixon v. Kent County, 76 F.3d 1381, 1386-87 (6th Cir. 1996). A similar textual analysis would reveal no word or phrase which reasonably supports claims on the basis of crossover or influence districts. Neither does analysis of the Act's legislative history.

As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Bd. of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). In 1965, Section 2 of the Act was an uncontroversial preamble which was nothing more than a restatement of this Civil War Amendment. *Chisom*, 501 U.S. at 392; *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 60-62 (1980). Pursuant to this constitutional power, the entire statute was aimed at discriminatory voting procedures which continued to deprive African-Americans of access to the ballot, such as literacy tests and other similar devices. *Holder v. Hall*, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in the judgment) (citing Thernstrom, *Whose Votes Count?*, at 17-27). At the time, Attorney General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure . . . from ordinary concepts of our federal system," Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the

Senate Committee on the Judiciary, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its limited scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g., Bolden*, 446 U.S. at 60-61.

The Act proved immediately successful in ensuring racial minorities access to the voting booth. By the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%. Thernstrom, *Section 5*, at 44. Since the Act's enactment, there has also been a "growing receptiveness of a predominantly white electorate to minority candidates." Timothy G. O'Rourke, *The Voting Rights Paradox in Controversies in Minority Voting* 109 (1992); *see also Holder*, 512 U.S. at 895 (Thomas, J., concurring in the judgment).

In response to racist efforts in Mississippi and elsewhere to curtail the political impact of black enfranchisement, this Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen*, 393 U.S. at 569. Switches from single-member districts to at-large and other schemes to weaken black electoral power violate both the statute and the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *White v. Regester*, 412 U.S. 755, 765-66 (1973). In 1982, Congress amended Section 2 of the Act to prohibit legislation in jurisdictions nationwide that results in the dilution of a minority group's voting strength, regardless of the legislature's intent. 42 U.S.C. § 1973. "Congress intended that the Voting Rights Act

eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69 (citing S. Rep. No. 417, 97th Cong., 2nd Sess. 5 (1982), 1982 U.S.C.C.A.N. 177; H.R. Rep. No. 97-227, p. 31 (1981)).

The extensive legislative history of the Act contains absolutely no evidence that Congress even contemplated, let alone intended, the requirement of coalition, crossover, or influence districts. *See* Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac. L.J. 619, 642 (1990) ("The voluminous legislative history surrounding the [1982] amendment to Section 2 contains no reference to a 'coalition' suit."); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 111-12 n.99 (1989) ("Congress provided no answer in either the Act's wording or in accompanying committee reports," concerning coalition suits.).

The committee report for the 1975 amendments does not make any reference, implicit or explicit, to an "aggregation" or coalition of different groups.[4] *See* S. Rep. No. 295, 94th Cong., 1st Sess. 1 (1975), *reprinted*

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[4] As noted by *Nixon*, 76 F.3d at 1387 n.7, Congress only addressed the "aggregation of separately protected groups" in the Act on one occasion, and then in the negative. *See* 42 U.S.C. § 1973(b)(f)(3) (language minorities may not aggregate their numbers for purposes of meeting the threshold numeric requirements for foreign-language ballots of 42 U.S.C. § 1973(b).

in 1975 U.S.C.C.A.N. 774. Neither do the subsequent reports for the 1982 amendments. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted* in 1982 U.S.C.C.A.N. 177, 205.

The Senate Report which accompanied the 1982 amendments to the Act states that the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Gingles*, 478 U.S. at 44 n.9 (citing S. Rep. No. 417, 97th Cong., 2nd Sess. 5 (1982), 1982 U.S.C.C.A.N. 182). Mandating coalition, crossover, or influence voting districts so that certain minority voters can elect the candidate of their choice goes beyond ensuring equal access to the political process; it effectively requires districts that will always guarantee the election of the minority-preferred candidate by the sheer numbers of a multi-racial coalition wherever such a coalition exists. "Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others." Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 17 (2005) (citing *De Grandy*, 512 U.S. at 1020).

In addition, the Act was clearly meant to address matters of race, not political party affiliation. President Lyndon Johnson was focused solely on ending practical barriers to minority voting, which he identified and divided into three categories: (1) technical, (e.g., poll taxes), (2) noncooperation, and (3) subjective (e.g., literacy tests). *See* Message from

the President of the United States Related to the Right to Vote, 89th Cong., 1st Sess. (1965). President Johnson's speech to a special joint-session of Congress concerning the Act emphasizes his singular focus:

> The issue of equal rights of American Negroes is [a challenge to the values and purposes of America]. And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, then we will have failed as a nation. And we meet here tonight as Americans—*not as Democrats or Republicans*—we are met here as Americans to solve that problem.

Id. The Act's legislative history shows an intent to end barriers to minority voting, but is virtually absent of any reference to political party representation.

B. The Purpose of Section 2 Is Not to Protect Bi-Racial Political Coalitions

The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Nor to require the drawing of districts in such a way just to "give a minority group more voting power." *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986). Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153. Thus the Act protects a singular group of minority voters, not bi-racial coalitions. In holding that a group too small to be a district majority "cannot maintain that they would have been able to elect representative

of their choice," *Gingles*, 478 U.S. at 50 n.17, the *Gingles* Court concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class to elect a representative of its choice, by "dictat[ing] outcomes independently." *Voinovich*, 507 U.S. at 154; *see also Gingles*, 478 U.S. at 67-68 ("Section 2(b) states that a violation is established if it can be shown that members of a protected minority group 'have less opportunity than other members of the electorate to . . . elect representative of their choice.'" (quoting 42 U.S.C. § 1973) (emphasis added in *Gingles*)).

The state officials argue that the minority group in House District 18, comprising an African-American voting age population of only 39.36%, is able to "elect representatives of their choice." 42 U.S.C. § 1973(b). In actuality, the minority group can only claim an ability to "influence" elections by joining multi-racial political coalitions. *Gingles*, 478 U.S. at 46 n.12; *accord De Grandy*, 512 U.S. at 1009 (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [electoral structure] prevented black voters from constituting a *majority* in additional districts"); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) ("[A] minority group not sufficiently large to constitute a majority" claims an "ability to influence, rather than alter, election results.").

The Court previously explained in *Growe* that a minority group claiming vote dilution must establish that it "has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. And "[u]nless minority voters possess

the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17. As a result, to establish a vote dilution claim under Section 2, minorities must prove that they have been unlawfully denied the political opportunity they would have enjoyed as a voting-age majority in a single-member district, which is the opportunity to "dictate electoral outcomes independently" of other voters in the jurisdiction. *Voinovich*, 507 U.S. at 154. When a districting plan denies African-American voters the numbers they need to form a winning coalition with white voters, the plan deprives the entire coalition, not just the African-Americans. Because even the white voters in such a coalition were denied the ability to elect the candidate of their choice, the challenged plan does not result in vote dilution "on account of race" and does not cause African-American voters to have "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(a) & (b).

The Court recently affirmed a district court decision that struck down a Section 2 claim based upon a crossover/influence district that was similar in many respects to House District 18. *LULAC*, 548 U.S. 399. In *LULAC*, the citizen voting-age population in District 24 was composed of 49.8% white, 25.7% African-American, and 20.8% Hispanic. *Id.* at 443. Appellants claimed that the African-American voters had effective control of District 24, because of the white and Hispanic crossover votes. *Id.* at 444. However, "[t]hat African-Americans had influence in the district . . . does not suffice to state a § 2 claim in these cases." *Id.* at 445 (citations omitted).

The Seventh Circuit rejected Section 2 claims where the single-member districts were composed of African-American voting age populations of 43.7% and 43.2 %. *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 939 n.2 (7th Cir. 1988). The court recognized that African-Americans comprising less than a majority in a district would not have the requisite potential to elect their candidates of choice. "[E]ven if all eligible black voters supported a single candidate in the proposed single-member district, that candidate would not be assured of electoral success. A sole challenger, supported by a bloc of white voters, would win." *Id.* at 944. Members of a racial group are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition or count on crossover votes, because no racial group (or group defined by any other characteristic) has that constitutional right. If a plan impairs votes not "on account of race" but on account of membership in a political coalition, the plan does not violate Section 2. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (no vote-dilution claim when a minority group, "along with all other Democrats, suffers the disaster of losing too many elections"); *Bolden*, 446 U.S. at 109 (Marshall, J., dissenting) (Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"). Depriving minorities of the ability to form a winning coalition does not result in vote dilution on account of race, and does not mean that minorities have less opportunity than other members of the electorate to elect representatives of their choice. Carvin & Fisher, *supra*, at 17.

In actuality, the North Carolina's redistricting here is an attempt to use race as a proxy for political

party affiliation in an effort to have courts mandate political gerrymandering. *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 455 (2000) ("[T]he Democratic Party will seek to work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority."). Experience in the lower courts confirms that coalition, crossover, and influence claims merely seek advantage for a political party to which minority voters belong. *See, e.g., Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 n.22 (D.S.C. 2002) (claim seeks 25% to 40% African-American districts so that a Democratic candidate can use the African-American vote to defeat any Republican); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) ("[M]ore minorities are required in [a district] to make the congressional race more competitive for democratic candidates.").

The argument "that a coalition of black and white voters may claim that a redistricting plan dilutes their *combined* ability to elect candidates confuses the purpose of Section 2." *Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004). The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153. Section 2 is not violated unless minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b).

II

THE FIRST *GINGLES* PRECONDITION PROVIDES LOWER COURTS WITH AN ESSENTIAL OBJECTIVE RULE

In *Gingles*, this Court set forth three preconditions a plaintiff must demonstrate in order to establish that a legislative district is required to be drawn to comply with Section 2. These preconditions require a plaintiff to show that (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive" and thus votes as a bloc; and (3) the majority population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

Plaintiffs trying to make out a Section 2 claim must prove that, but for the challenged plan, minority voters would have been able to elect representatives of their choice. *Gingles*, 478 U.S. at 50 n.17. Otherwise, the plan "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50; *accord Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (claim of minority vote dilution not possible if "there is no minority voting power to dilute"). The reason for the first *Gingles* precondition is clear: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17; *see also Growe*, 507 U.S. at 40 (The first precondition is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

The North Carolina Supreme Court understood the importance of the first *Gingles* precondition when it held that House District 18 was not required by Section 2:

> Thus, after taking into account the language of *Gingles*, the weight of persuasive authority from the federal circuits, the importance of imposing a practicable rule, the necessity for judicial economy, the redistricting responsibility of the General Assembly, and the inherent tension lurking in the third *Gingles* prong, *we conclude that a bright line rule is appropriate. Accordingly, if a minority group is geographically compact but nevertheless lacks a numerical majority of citizens of voting age, the minority group lacks the power to decide independently the outcome of an election, and its voting power has not been diluted by the lack of a legislative district.* In such a case, the first *Gingles* precondition has not been satisfied and the General Assembly is not required to create a Section 2 legislative district.

Pender County, 361 N.C. at 506, 649 S.E.2d at 374 (emphasis added). The North Carolina Supreme Court's acceptance of a bright-line rule is consistent with other courts that have emphasized the need for such a rule to act as a gatekeeper. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge court) (Once the *Gingles* majority "threshold is breached, there appears to be no logical or objective measure for establishing a threshold minority group size necessary for bringing an influence claim under § 2."). The *Gingles* majority-in-a-district

requirement provides "a choice of clear rules over muddy efforts to discern equity," and it "reins in the almost unbridled discretion that section 2 gives the courts." *McNeil*, 851 F.2d at 942. Movement away from the *Gingles* standard "invites courts to build castles in the air," based on quite "speculative" foundations. *Id.* at 944. The *Gingles* Court "based its bright-line requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice." *Id.*

The bright-line rule effectuates the judicial duty to enforce voting rights while at the same time recognizing, as the Court instructed, that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34. Without a majority-minority threshold, any redistricting scheme could be challenged whenever disparate minority communities could be pooled together in sufficient numbers to create some potential to elect. *See Parker v. Ohio*, 263 F. Supp. 2d 1100, 1108 (S.D. Ohio 2003) (Graham, J., concurring) ("If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can 'influence' the result of elections.").

Without the first *Gingles* precondition, members of any protected minority group could always launch a lawsuit to increase their presence in a district and argue that this increase will cause their candidate to prevail. As the Seventh Circuit cautioned, "[c]ourts might be flooded by the most marginal section 2 claims

if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections." *McNeil*, 851 F.2d at 947; *see also McGhee v. Granville County, N.C.*, 860 F.2d 110, 116 (4th Cir. 1988) (the first *Gingles* precondition is necessary to prevent vote dilution concept from being "an open-ended one subject to no principled means of application"); *Burton v. Sheheen*, 793 F. Supp. 1329, 1350 (D.S.C. 1992) (The *Gingles* preconditions shield "the courts from meritless claims."); *Hastert*, 777 F. Supp. at 654 ("[A]n unrestricted breach of the *Gingles* single-district majority precondition will likely open a Pandora's box of marginal Voting Rights Act claims.").

> Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations.

Gingles v. Edmisten, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part*, *Gingles*, 478 U.S. 30.

Interpreting Section 2 as mandating redistricting in order to establish a crossover voting district requires the dismantling of the *Gingles* preconditions. A crossover district, like the one at issue here, is "premised upon a minority group gaining support from voters in the typically Caucasian majority to elect the candidate of the minority group's choice." *Pender County*, 361 N.C. at 506, 649 S.E. 2d at 373-74. But in contradiction, the third *Gingles* precondition requires

that the majority population vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*, 649 S.E. 2d at 374 (citing *Gingles*, 478 U.S. at 51). But if the majority group does not vote sufficiently as a bloc, the third *Gingles* prong cannot be met. When a minority group is able to accumulate sufficient crossover white votes that the minority candidate is successful, the *Gingles* premise that the white majority votes as a bloc to defeat the minority group's candidate is undermined. *See Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) (recognizing the "tension" in "any effort to satisfy both the first and third prong of *Gingles*," and observing that "[t]o the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut"); *see also Voinovich*, 507 U.S. at 158 ("Here, as in *Gingles*, 'in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.'").

Thus, the North Carolina Supreme Court recognized, consistent with this Court's precedents, that a high level of crossover voting is inconsistent with the majority bloc voting defined in the third *Gingles* precondition and weakens the possibility of vote dilution. *Pender County*, 361 N.C. at 506, 649 S.E.2d at 374. In a coalition, crossover, or influence district, absent help from voters of other races, even if every eligible member of the minority group voted for a single candidate, that candidate would not be assured of electoral success.

The elimination of the first *Gingles* precondition means that Section 2 would require the creation of districts where minorities' preferred representatives are usually elected. If minority groups in the same district preferred different candidates, the court would have to determine which minority group should prevail. This is illustrated in *Metts*, where the district challenged had a 21.4% black population and a 46.7% Hispanic population. This had altered the preexisting district from 25.7% black and 41% Hispanic. A Hispanic challenger then defeated the African-American incumbent and went on to win the election in the new district. *Metts*, 363 F.3d at 9. The *Metts* majority refused to affirm a Rule 12(b)(6) dismissal based on the plaintiffs' inability to satisfy the first necessary *Gingles* precondition. "The net result of . . . *Metts* . . . was to authorize the lower court to deprive Hispanic voters, who constituted the bulk of the district, of their new electoral opportunity and return power to the smaller African-American group that had enjoyed representation during the prior decade." Carvin & Fisher, *supra*, at 26. "[R]acial harmony is hardly enhanced when the interests of one minority group are subverted to further those of another minority group." *Id.*

Courts could easily face similar difficulty in a crossover district composed of white voters and one minority group, like House District 18. For example, assume that 55% of the voters in a given district are white and 45% of the remaining voters are African-American. Next assume that 25% of the African-American voters prefer Candidate A, and the other 20% of African-American voters prefer Candidate B. In the election, 20% of the white voters join with 25% of the African-American voters and vote for candidate A,

but the other 35% of white voters join with the other 20% of African-American voters to elect Candidate B. The end result is that the candidate preferred by the majority of African-American voters lost the election. This leads to several possibilities. First, without the first *Gingles* precondition, the 20% of African-American voters who preferred Candidate B could claim that disturbing this status quo would violate Section 2—even though their choice is not even that of the majority of African-Americans. Second, without the first *Gingles* precondition, the 25% of African-American voters who preferred Candidate A could claim that they were denied the opportunity to elect their preferred candidate and bring a voter dilution claim under Section 2. The result would be to deprive the other group of African-Americans the opportunity to elect their preferred candidate.

To further illustrate the first point, imagine an election where there are three candidates. As before, assume that 55% of the voters in the district are white and 45% of the remaining voters are African-American. In the election, 20% of voters who are white vote for Candidate A, 25% of voters who are African-American vote for Candidate B, and 20% of the other voters who are African-American join with 35% of the other white voters to form a majority and elect Candidate C. Next assume that after the election, Candidate A's supporters attempt to redraw the district (along with neighboring districts, where Candidate A won by more votes than he needed) in such a way as to help Candidate A win in the next election. If Section 2 is interpreted in such a way as to require coalition, crossover, or influence districts, then the following vote dilution claim could arise: In response to the redistricting, voters who supported Candidate C may

claim a Section 2 violation, since the African-American voters preferring Candidate C lost in a coalition district. The end result would be to deny the wishes of the African-Americans who preferred Candidate B.

The absurdity of these outcomes is surpassed by the actual claim in *Metts*. By alleging that their multi-racial political coalition had the potential to elect its preferred representatives, the African-American plaintiffs in *Metts* were in essence contending that more *non*-African-American voters than African-American voters were voting for African-American-preferred candidates. *Metts*, 363 F.3d at 13 (Selya, J., dissenting). When the political candidate preferred by a racial minority is elected by a majority of non-minority voters, there is no discrimination in voting. Application of the Act to this situation cannot be justified when its purpose is to "eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69. Should *Gingles* be undermined by the elimination of the first precondition, the above results would be repeated across the country.

Race-conscious redistricting to form coalition, crossover, and influence voting districts ensures that we will never have a color blind society. This is because legislators will be required to constantly adjust racial percentages in districts where minority voters are present in sufficient numbers to "influence" electoral outcomes. If Legislatures must constantly manipulate the percentages of minority voters to avoid liability, then virtually no redistricting decision will be made where race is not the predominant factor in violation of the color blind command of *Shaw v. Reno*, 509 U.S. 630 (1993). Furthermore, courts are ill-

equipped to decide which districting plans will elect more minority-preferred candidates. It was recognized as early as *Gingles* that shifting African-American voters between districts has an inherently unpredictable effect on the number of African-American-preferred candidates elected. *See Gingles*, 478 U.S. at 87-89 (O'Connor, J., concurring in judgment); *accord Ashcroft*, 539 U.S. at 480-82. As then-Judge Breyer observed, entertaining claims like appellants "would require courts to make the very finest of political judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm.*, 784 F.2d at 412.

The state supreme court's holding below is thus consistent with an understanding that if "the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the" challenged electoral structure. *Gingles*, 478 U.S. at 50 n.17.

III

INTERPRETING SECTION 2 TO REQUIRE COALITION, CROSSOVER, AND INFLUENCE DISTRICTS RAISES SERIOUS CONSTITUTIONAL CONCERNS

In addition to the plain language, legislative history, and practical arguments that have already been made, an interpretation of Section 2 that results in more districts being drawn on the basis of race would create grave constitutional problems for the

underlying statute. Any government action that divides us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 494 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw*, 509 U.S. at 657, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

This Court's decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Shaw*, 517 U.S. at 904); *Miller v. Johnson*, 515 U.S. 900, 904-05 (1995); and *Adarand*, 515 U.S. at 227). In *Reno*, 509 U.S. 630, this Court articulated the equal protection principles that govern a state's drawing of congressional districts, noting that laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decisionmaking. Reapportionment legislation that classifies and separates voters by race reinforces racial stereotypes and threatens to undermine our system of representative democracy. Such redistricting signals to "elected officials that they represent a particular

racial group rather than their constituency as a whole." *Reno*, 509 U.S. at 650.

Opening the door to vote dilution claims to require the formation of coalition, crossover and influence voting districts will result in an increase of race-conscious redistricting across the county. Section 2 requires more than the ability to influence the outcome of an election. "If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, *raising serious constitutional questions*." *LULAC*, 548 U.S. at 446 (citing *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)) (emphasis added).

Congress clearly intended that some consideration of race be given in very limited cases in order to eradicate vestiges of discrimination in voting. For instance, as *Gingles* discussed, where a large minority population is divided by voting districts and is consistently outvoted, Section 2 of the Act requires the redrawing of district lines with race as a consideration. But if the first *Gingles* precondition is eliminated, and Section 2 is interpreted to allow coalition, crossover, and influence districts, race will become the primary factor in the majority of redistricting across the country.

Section 2 of the Act should not be construed in a manner that calls into question its constitutionality. As this Court has long adhered to the policy stated in *Hooper v. California*, 155 U.S. 648, 657 (1895): "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach also recognizes "that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will

therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *Bd. of Supervisors of Grenada County v. Brown*, 112 U.S. 261, 269 (1884)); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Panama R. Co. v. Johnson*, 264 U.S. 375, 390 (1924).

In a racial gerrymandering claim, "[r]ace must not simply have been a motivation for the drawing of a majority-minority district, but the predominant factor motivating the legislature's districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (citation and internal quotation marks omitted). The race of voters was undisputedly the primary factor considered by North Carolina's General Assembly when it created the House District 18 crossover district. Ostensibly, that district was intended to meet the requirements of Section 2 of the Act. Specifically, the new district was formed by packing African-American voters from two counties into one district so that the new district would have a total African-American population of 42.89%, and an African-American voting age population of 39.36%. *Pender County*, 361 N.C. at 494-95, 649 S.E. 2d at 366-67. If Section 2 is interpreted as requiring coalition, crossover, or influence districts, then the race of voters will always be the primary factor in redistricting, and district lines will repeatedly be drawn along racial lines.

The Sixth Circuit warns that the "language of the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose and . . . there are compelling reasons to believe that they are not." *Nixon*, 76 F.3d at 1393. First, racial gerrymandering "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting).

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than political issues are generated; communities seek not the best representative but the best racial or religious partisan . . . . [T]hat system is at war with the democratic ideal.

Id. at 67. "Racially defined wards" accentuating "race-based allegiances and divisions," Hearings on S. 53, et al., Bills to Amend the Voting Rights Act of 1965, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 1449 (Senate Hearings) (statement of Professor William Van Alstyne), obviate the need to form coalitions and seek compromise—two of the most heralded features of American government. As Chief Justice Roberts stated, "I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a sordid business, this

divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., dissenting).

Second, a necessary corollary of this racial divisiveness is ambivalence by white politicians toward minority citizens and minority politicians toward white citizens. It is "unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring), *cert. denied*, 490 U.S. 1030 (1989). "[A]ssured minority representation encourages local white politicians to say to the minority communities: 'You have your own representatives. Don't come to us with your problems; speak to them.'" Hearings on S. 53, *supra*, at 1327-28 (testimony of Professor Horowitz).

Finally, and most importantly, racial redistricting makes the patently false and pernicious assumption that all minorities think alike and that only a member of a given minority can properly represent minority interests. This Court has held that racial gerrymandering "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Reno*, 509 U.S. at 647. Justice Thomas reiterated and expanded on these sentiments: "The clear premise of the system is that geographic districts are merely a device to be manipulated to establish 'black representatives' whose real constituencies are

defined, not in terms of the voters who populate their districts, but in terms of race. The 'black representative's' function, in other words, is to represent the 'black interest.'" *Holder*, 512 U.S. at 907 (Thomas, J., concurring).

CONCLUSION

"Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Reno*, 509 U.S. at 657. With respect to voting, racial classifications carry particular dangers. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.*

For the foregoing reasons, the Court should affirm the decision of the North Carolina Supreme Court that dutifully followed both the reasoning and holding of *Gingles*.

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Respectfully submitted,

RALPH W. KASARDA
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Pacific Legal Foundation, Center for Equal Opportunity, Hans A. von Spakovsky, Project 21, Abigail Thernstrom, and Karl S. Bowers, Jr.

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v.

DWIGHT STRICKLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA SUPREME COURT

BRIEF FOR NATHANIEL PERSILY, BERNARD GROFMAN, BRUCE CAIN, THEODORE ARRINGTON, AND LISA HANDLEY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

NATHANIEL PERSILY*
COLUMBIA LAW SCHOOL
JEROME GREENE HALL
435 West 116th Street
New York, NY 10027
(212) 854-8379

* *Counsel of Record*

MICHAEL B. DE LEEUW
DALE E. HO
JORDAN M. BARRY
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000

Counsel for Amici Curiae

June 17, 2008

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INTEREST OF THE *AMICI CURIAE*

Professor Nathaniel Persily, Professor Bernard Grofman, Professor Bruce Cain, Professor Theodore Arrington, and Doctor Lisa Handley are all political scientists who have been appointed by courts as nonpartisan experts to draw redistricting plans.[1] *See Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004) (Persily); *In re Legislative Redistricting of State*, 805 A.2d 292 (Md. 2002) (Persily); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002) (Persily and Grofman); *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (Grofman); *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982) (Grofman); *Navajo Nation v. Ariz.*

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[1] Counsel of record for the parties received notice of *amici*'s intention to file this brief, and the parties have consented to this filing. As required by Rule 37(6) of the Rules of the Supreme Court of the United States, *amici* state that the accompanying brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation of this brief was made by any person other than *amici curiae* and their counsel. Nathaniel Persily is Professor of Law and Political Science and Director of the Center on Law and Politics at Columbia Law School; his CV is available at http://www.persily.com/. Bernard Grofman is Professor of Political Science and Director of the Center for the Study of Democracy at the University of California, Irvine, and holds the Jack W. Peltason Bren Foundation Endowed Chair; his CV is available at http://www.vsocsci.uci.edu/~bgrofman/. Bruce Cain is the Heller Professor of Political Science at the University of California at Berkeley and Executive Director of the University of California Washington Center; his biography is available at http://www.polisci.berkeley.edu/faculty/bio/permanent/Cain,B/. Theodore Arrington is Professor of Political Science at the University of North Carolina at Charlotte; his CV is available at http://www.politicalscience.uncc.edu/tarrington/. Lisa Handley is President of Frontier International Election Consulting.

Indep. Redistricting Com'n, 230 F. Supp. 2d 998 (D.Ariz. 2002) (Cain); *Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (Arrington); *The Fund for Accurate and Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662 (N.D.N.Y. 1992) (Arrington); *Allen v. Pataki*, Index No. 101712/02 (N.Y. Sup. Ct. May 3, 2002) (Handley).

In addition, *amici* have served as expert witnesses in many redistricting cases across the United States and have authored numerous publications that have been cited by federal and state courts, including the U.S. Supreme Court. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986) (Grofman); *Abrams v. Johnson*, 521 U.S. 74, 108 (1997) (Grofman); *Bush v. Vera*, 517 U.S. 952, 1040-41 (1996) (Grofman); *Shaw v. Hunt*, 517 U.S. 899, 912 (1996) (Grofman); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (Grofman); *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (Grofman); *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (Grofman and Handley); *Holder v. Hall*, 512 U.S. 874, 895 (1994) (Grofman and Handley); *N. Y. State Bd. of Elections v. Lopez Torres*, 128 S.Ct. 791, 802 (2008) (Kennedy, J. concurring) (Persily); *Vieth v. Jubelirer*, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) (Persily); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 226-27 (1999) (Rehnquist, C.J., dissenting) (Persily); *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (Cain); *United States v. Charleston County*, 365 F.3d 341, 344 (4th Cir. 2004) (Arrington); *United States v. Blaine County*, 363 F.3d 897, 910 (9th Cir. 2004) (Arrington); *Hines v. Ahoskie*, 998 F.2d 1266, 1270 (4th Cir. 1993) (Arrington). *Amici* expect to draw redistricting plans for the 2010 round of redistricting and therefore take an interest in this

case because it may affect the principles and methodologies employed by *amici* in future redistricting plans.

Amici submit this brief on behalf of neither party in this case with the goals of assisting the Court in its assessment of the practical effect of its decision and of providing some empirical data that may be absent from the principal parties' briefs. In this brief, *amici* do not take a position on the question before the Court concerning the propriety or desirability of the so-called 50% rule, but seek instead to inform the Court of the impact its decision might have on the 2010 redistricting process.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to address whether minority communities that constitute less than 50% of a potential district can state a vote dilution claim under section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2006). In answering that question, the Court ought to consider two practical issues concerning the way any governing standard will affect the drawing of districts and the challenges brought under section 2. The Court should understand (1) the strengths and weaknesses of different population statistics that can be used to construct or to challenge a redistricting plan; and (2) the legal and political variables that will determine the population percentages necessary for minorities to have an equal opportunity to elect their candidates of choice.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court addressed a situation in which a minority

population could constitute a majority of a potential single member district. The Court, however, has never specified which of the following population statistics are the appropriate metrics for that inquiry:

- "total population," the total number of residents in a given geographic area;
- "voting age population" ("VAP"), the total number of residents at least 18 years of age;
- "citizen voting age population" ("CVAP"), the total number of citizens who are at least 18 years of age;
- "eligible voters," the total number of residents who are legally eligible to vote;
- "registered voters," the total number of residents who are actually registered to vote; or
- "actual voters" the total number of residents who turn out to vote.

In the instant case, the North Carolina Supreme Court, like many other courts, adopted CVAP as the relevant statistic for measuring population size. *See Pender County v. Bartlett*, 649 S.E.2d 364, 370-71 (N.C. 2007).

Only total population and voting age population will be made available from the Census Bureau at the block level for the 2010 redistricting. For various reasons concerning the well-known undercount of racial minorities, the new way that the Census Bureau has been tabulating race, and the number of ineligible voters captured by such statistics, aggregate population and voting age population census data should not be viewed as precise measurements of potential voters. For the 2010 round of redistricting, moreover, citizenship

status will not be included as a question on the "short form" of the census. Consequently, citizenship data will not be part of the Census Bureau's P.L. 94-171 datafile, the dataset that provides the block level data necessary to form redistricting plans. Citizenship data will only be available from the American Community Survey, which is sent to three million households every year and which cannot provide reliable estimates at the block level, if they are provided at all in time for redistricting.

Of course, no population statistic—by itself—is sufficient to demonstrate the likelihood that a minority community will have an equal opportunity to elect its candidate of choice. Section 2 dictates an inquiry into the "totality of the circumstances" that can affect minority political opportunity, and *Gingles* emphasizes, in particular, the importance of racially polarized voting to demonstrating vote dilution. Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. In practice, such extreme conditions are never present. The required percentage for an opportunity district will vary considerably based on the relative eligibility and turnout of minority voters, the extent of racial polarization in the electorate, the potential for coalitions to form among racial minority groups, the minority population share of the primary electorate, and the incumbency status of the district. Based on these factors, some districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community

to have an equal opportunity to elect its candidate of choice.

ARGUMENT

I. THE AVAILABILITY AND ACCURACY OF POPULATION DATA CAN HAVE A SUBSTANTIAL EFFECT ON THE ESTIMATES OF THE MINORITY POPULATION NECESSARY TO ELECT A MINORITY CANDIDATE OF CHOICE.

As redistricting experts we are called upon by courts and jurisdictions to draw plans either following the decennial census or after a court decision strikes down a jurisdiction's plan under state or federal law. Creating a plan usually involves moving census-defined geographic units, such as census blocks, from one district to the next while keeping in mind the relative populations of each district. Census redistricting data (the so-called "P.L. 94-171 datafile") include aggregate population and voting age population broken down by race for all census geographies. To comply with the one-person, one-vote rule and the Voting Rights Act (the "VRA"), those drawing districting plans must pay close attention to how each addition or subtraction of a census block shifts a district's total population and changes its racial composition.

In addition to census redistricting data, those constructing a plan may have other information, such as precinct-based election results, data reflecting communities of interest, locations of incumbents' residences, and various defining features of the geography being carved up. In jurisdictions with a history of racial polarization in voting patterns, past election data will prove critical

in assessing the potentially dilutive effect of a plan. To avoid violations of section 2 of the VRA, an expert must understand the likely electoral consequences of drawing a district with particular racial percentages in a given area based on its unique electoral history. Even within the same state, two districts that have the same racial makeup may "perform" quite differently based on the different history and political behavior of voters and candidates in those areas. When assessing whether a district will give minorities an equal opportunity to elect their candidates of choice, demographic and electoral data are critically important tools that often must be supplemented with a common sense appreciation for local political circumstances.

A. Section 2 of the VRA Must Be Interpreted to Accommodate the Imperfect Nature of the Population Data Available to Jurisdictions and Potential Plaintiffs

All available population estimates—total population, voting age population, citizen voting age population, eligible voters, registered voters, and voters who turn out—may be important in assessing whether a district can provide minorities with an equal opportunity to elect their candidates of choice. However, each estimate has its own sources of error and bias, as well as other drawbacks, such as its unavailability in time for redistricting or the level of geography at which such data are released. These data-related challenges are an inherent part of the redistricting process, and the interpretation of section 2 of the VRA must account for them.

Some population statistics underrepresent the number of potential minority voters in a district, while other data sets overrepresent it. For example, "total population" or "voting age population" (the data available in the P.L. 94-171 dataset) do not account for people who are ineligible to vote because they are not citizens, or because they are incarcerated or disenfranchised. In some jurisdictions, high rates of incarceration of a minority population or felon disfranchisement can affect the minority population's share necessary (or even possible) for the minority community to elect its preferred candidates. One study has found "256 counties that have more than a quarter of their Black population behind bars." *See* Peter Wagner, *Outdated Methodology Impairs Census Bureau's Count of Black Population* (2004), http://www.prisonersofthecensus.org/news/2004/05/03/blackpopulation/.[2] In areas with large prison populations and severe racial polarization in voting, a district may often need to be greater than 50% minority VAP or CVAP for minorities to have an equal opportunity to elect their candidate of choice.

Even as a measurement of the population they purport to count, census data are not precise—particularly with respect to minority populations. The decennial census always misses and double counts millions of people, and those errors are not randomly distributed throughout the population.

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[2] Although most such counties have small black populations, the study excluded any county that had fewer than 100 African Americans behind bars. Moreover, given that the study looks only at the share of the total population behind bars, rather than the voting age population, the number of such counties where a quarter of the black voting age population is incarcerated is probably higher.

See generally Margo J. Anderson & Stephen E. Feinberg, *Who Counts?: The Politics of Census-Taking in Contemporary America* (1999); Nathaniel Persily, *The Right to Be Counted*, 53 Stan. L. Rev. 1077, 1081-82 (2001). Prior to the 2000 census, the undercount (and particularly the "differential undercount" among minority groups) was quite dramatic. The 1990 census, for example, missed about 4% of African Americans, 5% of Hispanics, 2.3% of Asian Americans and Pacific Islanders, 12.2% of American Indians on reservations, but only 0.7% of non-Hispanic whites. *See* Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 Minn. L. Rev. 899, 903 (2001). Because of intense efforts to correct the "differential undercount" in the 2000 census, those figures were cut in half, but substantial differences still remained between racial groups. *See* Executive Steering Comm. for Accuracy and Coverage Evaluation Policy [hereinafter ESCAP], Bureau of the Census, U.S. Dep't of Commerce, [hereinafter Census Bureau] *Recommendation Concerning the Methodology to be Used in Producing the Tabulations of Population Reported to States and Localities* 2-3 (March 1, 2001), http://www.census.gov/dmd/www/pdf/Escap2.pdf. (noting that "Census 2000 continued longstanding patterns of differential coverage, with minority groups, renters, and children all exhibiting lower coverage rates"). It remains unclear whether adequate funding and similar efforts to correct the differential undercount will be present for the 2010 census.

In addition, the new multiracial checkoff format for the census race question—adopted for the first time in the 2000 census and continuing in the 2010 census—creates additional variation in the way

racial statistics will be expressed. The 2000 census was the first census to allow respondents to check off more than one race. As a result, census racial statistics can be expressed by placing each respondent into one of 126 different racial and ethnic combinations[3] or by reaggregating multiracial respondents into the seven racial and ethnic groups on the census.[4] *See, e.g.*, Joshua R. Goldstein & Ann. J. Morning, *Back in the Box: The Dilemma of Using Multiple-Race Data for Single Race Laws*, in *The New Race Question: How the Census Counts Multiracial Individuals* 119, 121-22 (Joel Perlmann & Mary Waters eds., 2002). For some racial groups, the differences as to "who" counts as "what" can be quite large. For the number of American Indians and Alaska Natives nationally, for example, the difference between those two counting approaches differs by more than 60%, because a large share of those who check off "American Indian" also check off another category such as "white". For most other

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[3] The P.L. 94-171 datafile presents racial data in a 126 category format. The 126 categories result from the potential combinations among the 6 census race categories and the Hispanic origin category. *See* Persily, *Color by Numbers*, *supra*, at 927 n.112. The six census race categories are White, African American, Asian, Native Hawaiian or Other Pacific Islander, American Indian or Alaska Native, and Some Other Race. The census also asks a separate Hispanic Origin question.

[4] OMB Bulletin No. 00-02 requires the reaggregation of multiple race respondents back into single-race categories. Responses that combine more than one minority race are allocated to the minority race, while responses that include two or more minority races are allocated in different manners, depending on the purpose of the calculation. *See* Office of Management and Budget, Bulletin No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement (March 9, 2000), *available at* http://www.whitehouse.gov/omb/bulletins/b00-02.html.

minorities the differences between the statistics are smaller (5% for African Americans, for example), but should be expected to grow with each subsequent census. Even the current differences in the various statistics could have an impact if the VRA is interpreted as requiring specified minority population levels.

The legal significance of these statistical issues to voting rights cases will vary greatly depending on the minority group and the area of the country involved. *See* Nathaniel Persily, *The Legal Implications of a Multiracial Census*, in *The New Race Question: How the Census Counts Multiracial Individuals*, *supra*, 161, 171-74. If population percentages and thresholds will continue to constitute one part of the test for a viable voting rights claim, courts will need to consider these important statistical issues when conducting a context-specific analysis of the nature of a vote dilution claim. Although racial statistics must continue to perform a central role in defining and filtering vote dilution claims, the limits of available statistics counsel against any rule that would allow particular quirks in the data to determine the viability of a claim.

B. Although Citizenship Rates Affect the Minority Population Share Necessary for an Opportunity District, Citizenship Data Will Not Be Part of the 2010 Census Redistricting Datafile.

At the time of the next redistricting, the only population data generally available to linedrawers at the census block level will be total population and

voting age population. Very few states maintain voter registration statistics by race, *see* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1405 n.69 (2001), or provide estimates of the eligible voter population. *See* Michael McDonald, United States Elections Project, *Voter Turnout Frequently Asked Questions*, http://elections.gmu.edu/Voter_Turnout_FAQ.htm (last visited June 9, 2008). As was true in the 2000 census, the "short form" of the 2010 census (from which all census redistricting data are generated) will not ask whether the respondent is a citizen. *See* Census Bureau, *United States Census 2000 Form D-61A (2000)*, http://www.census.gov/dmd/www/pdf/d61a.pdf. This Court has noted the importance of accounting for citizenship status in estimating a minority population's ability to elect a candidate of its choice. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 2616 (2006) [hereinafter *LULAC*] ("the relevant numbers must include citizenship . . . because only eligible voters affect a group's opportunity to elect candidates"). If citizen voting age population (CVAP) is to be the metric against which vote dilution claims will be judged, linedrawers will need to employ estimates from sample surveys from previous years to generate rough approximations of the CVAP of districts.

The P.L. 94-171 datafile provided by the Census Bureau to states and localities in time for the 2010 redistricting will contain aggregate population and voting age population data broken down by race and Hispanic origin for all levels of census geography down to the census block level. *See* Census Bureau, *Census 2000 Redistricting Data*

(Public Law 94-171) Summary File, http://factfinder.census.gov/servlet/DTSelectedDatasetPageServlet (last visited June 9, 2008). Those data are derived from what was formerly known as the "short form" of the census, which is sent to every American household for which the Census Bureau has an address. In the 2000 census, one out of six Americans received the "long form" of the census, which contained more detailed questions concerning housing characteristics, ancestry, and citizenship. The long form has been abandoned for the 2010 census. *See* Census Bureau, *United States Census 2010: 2010 Census is Different* (2008), http://www.census.gov/2010census/about_2010_census/ 007622.html.

To replace data formerly supplied by the long form, the Census Bureau has conducted the American Community Survey (ACS) every year since 2005.[5] The ACS is a survey akin to the previous long form, but sent to only three million households each year instead of one sixth of American households at the time of the decennial census. The Bureau contends that estimates derived from each individual ACS are reliable for geographic areas of 65,000 or more, and that three years of aggregated data from the ACS will produce accurate estimates for geographic areas of 20,000 or more. By 2011, the

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[5] *Id.* The Census Bureau conducted a smaller scale of the ACS from 1996 to 2004 in selected counties throughout the United States. In 2005 it began sampling in every county in the United States. *See* Census Bureau, *American Community Survey*, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=sp1_acs (last visited May 30, 2008); Census Bureau, Question & Answer Center, *American Community Survey: Geographic coverage for 2005–2010*, https://ask.census.gov/cgi-bin/askcensus.cfg/ php/enduser/std_adp.php?p_faqid=951 (last visited May 30, 2008).

Census Bureau might produce estimates derived from the previous five years of the ACS for some smaller levels of geography, such as census tracts and block groups. *See* Census Bureau, *American Community Survey*, *supra*. The Census Bureau does not plan to incorporate any data from the ACS into the P.L. 94-171 redistricting datafile and estimates derived from the ACS, in any case, will not be provided at the census block level. Such estimates will also be expressed according to census-defined geography from the 2000, not 2010, census, they will not tabulate multiracial respondents in the same way as the P.L. 94-171 file, and they will define residency somewhat differently.

Because the ACS is the only census survey that includes a question concerning citizenship, citizen voting age population (CVAP) data will not be available in time for the 2010 redistricting, if ever, at a comparable level of accuracy and granularity to the short form data. This data challenge will be particularly acute for redistricting of county and city governmental bodies and subsequent section 2 challenges to such districts, which represent the lion's share of section 2 lawsuits. *See* Ellen Katz & The Voting Rights Initiative, *VRI Database Master List (2006)*, www.votingreport.org (listing only 96 out of 331 cases (29%) under Section 2 as involving districts for state elections, as compared to city, county, school, or other local election districts); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 677-78 (2006). Assessments of whether a district passes any particular CVAP threshold (such as 50%) must be tempered by a recognition that estimates of the citizen population will be quite rough for many

redistricting plans, particularly but not exclusively at the local level. As a result, the difference between a 45% and 51% minority CVAP district, in many instances, may be more illusory than real.

The data-related challenge presented by the lack of any citizenship data at the census block level does not mean that experts cannot factor in citizenship rates in their assessments of what constitutes an opportunity district. Quite the contrary, linedrawers are well aware of which areas contain large noncitizen populations and of how unrepresentative other official statistics may be. Although they may use aggregate and voting age population data as the building blocks for a plan, they will recognize the population "cushion" necessary for certain districts with large noncitizen populations to be able to have an equal opportunity to elect the minority's candidate of choice.

II. THE POPULATION SHARE NECESSARY FOR MINORITIES TO HAVE AN EQUAL OPPORTUNITY TO ELECT THEIR CANDIDATE OF CHOICE VARIES ACCORDING TO THE LEGAL AND POLITICAL CONTEXT OF A REDISTRICTING PLAN.

The plain language of section 2's "totality of the circumstances" test and *Gingles'* emphasis on "an intensely local appraisal" recognize that a minority community's opportunity to elect its candidate of choice is not merely a function of its relative size, but also of the voting behavior and other characteristics of all racial groups in a given jurisdiction. 42 U.S.C. § 1973 (2006); *Gingles*, 478 U.S. at 78, 79. In particular, the opportunity of a minority group to elect its preferred candidates of choice will depend on: (1) the relative rates of

turnout of different racial groups; (2) the likelihood that other voters in the district will cross over to vote for the minority's candidate of choice; (3) the minority share of the relevant primary electorate; and (4) the status of the district as incumbent-held or open. With increasing minority voter turnout and crossover voting, the share of a given district that a minority needs to have an equal opportunity to elect its candidate of choice decreases. Similarly, a minority-preferred candidate who can run in a favorable primary electorate or who enjoys the advantages of incumbency will require a lower minority percentage in order to have an equal opportunity to be elected. *See generally* Grofman, et al., *Drawing Effective Minority Districts*, *supra*, (operationalizing the argument set forth in this section).

A. The Relative Turnout of Minority and Nonminority Voters Will Affect the Population Share Required for Minorities to Have an Equal Opportunity to Elect Their Preferred Candidates.

The relative rates of voter turnout for each racial group in a given district will greatly affect the size of the minority population necessary to elect its candidate of choice. A given jurisdiction's minority turnout rate is, in part, a function of the legal barriers to voting and registration and of the eligibility and registration rates of its minority voters.

In the nation as a whole, the voter turnout rates of different racial groups have varied over time

and among different locations since the passage of the 1982 amendments to the Voting Rights Act. The most recent estimates from the Census Bureau show that in the 2004 election, 65.7% of non-Hispanic Whites, 56.2% of Blacks, and 28.0% of Hispanics reported voting. *See* Census Bureau, *Reported Voting Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2004*, (2005), http://www.census.gov/population/socdemo/voting/tabA-1.xls. As the table below depicts, these numbers are higher than they were in 1980 for African Americans and non-Hispanic whites, but not for Hispanics. In the intervening years, for the most part, turnout for each racial group has gone up and down, showing no clear monotonic trend upward. Rates of citizenship explain a great deal, but not all, of the variation in reported turnout among racial groups.

Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: Nov. 1964 to 2004

(Numbers in thousands)

Year	Total Voting-Age Populat	Total Percent		White non-Hispanic		Black		Hispanic (any race)	
		Tota Pop.	Citizen Pop.	Total Pop.	Citizen Pop.	Total Pop.	Citizen Pop.	Total Pop.	Citizen Pop.
Voted									
2004	215,694	58.3	63.8	65.7	67.1	56.2	59.9	28.0	47.2
1980	157,085	59.3	64.0	62.8	66.2	50.5	53.9	29.9	46.1
Registered									
2004	215,694	65.9	72.1	73.5	75.1	64.3	68.6	34.3	57.9
1980	157,085	66.9	72.3	70.3	74.1	60.0	64.1	36.4	56.0

Source: *Id.*

State specific turnout rates reveal remarkable variability not apparent from the national averages.

For example, in 2004, Hispanics in New Mexico reported voting at a rate of 50.6%, whereas their neighbors in Arizona reported a rate nearly half that (25.5%). *See* Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin, for States: November 2004* (2004), http:// www.census.gov/ population/socdemo/voting/cps2004/tab04a.xls. Only 43.6% of African Americans in New York say they voted in the 2004 elections, as compared to 61.3% of African Americans in California. *See id.* More importantly, the gap between minority and Anglo-white turnout shows a great degree of variation: In Florida in 2004, for example, a twenty percentage point gap separates black and Anglo-white turnout rates (64.9% to 44.5%); whereas in neighboring Georgia, the gap was only three percentage points (57.4% to 54.4%). *See id.*

Moreover, the turnout of a given racial group also varies with the types of candidates on the ballot and the competitiveness of a given race. The record turnout among African Americans in the 2008 Democratic presidential primaries attests to the impact that African American candidates can have on African American voter turnout. *See, e.g.*, Laura Litvan, *Obama's Coattails May Drive Record Black Turnout in House Races*, Bloomberg.com,May 29, 2006, http://www.bloomberg.com/apps/news?pid= 20601103&sid=adkPhlSZYS0Q&refer=u. Political scientists have also shown, for example, that African American and Hispanic turnout can increase in the first election following the creation of a majority-minority district. *See, e.g.*, Susan A. Banducci, et al., *Minority Representation, Empowerment and Participation*, 66 J. Pol. 534, 538-39, 552 (2004); Matt A. Barreto, *The Mobilizing Effect of Majority-*

Minority Districts on Latino Turnout, 98 Am. Pol. Sci. Rev. 65, 70-74 (2004).

B. The Severity of Racial Bloc Voting Among All Racial Groups in the Jurisdiction Is the Most Important Factor in Determining the Population Share Required for Minorities to Have an Equal Opportunity to Elect Their Candidate of Choice.

The numerosity requirement of *Gingles* exists in an interactive relationship with the second and third *Gingles* prongs, which require an analysis of minority political cohesion and white bloc voting. *See, e.g., Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004). As racial polarization decreases, the percentage of a racial group necessary for it to elect its preferred candidate will also decrease. The more non-minority voters who are willing to vote for the minority's candidate of choice, the smaller the minority population that is necessary to elect that candidate. In communities exhibiting extreme racial polarization and low relative turnout, a slim majority of the voting age population in a district will probably be insufficient for a minority group to elect its preferred candidate. However, if a sufficient number of voters outside of the minority group are willing to cross over, such a majority will be unnecessary.

In the time that has passed since the enactment of the 1982 Amendments to the Voting Rights Act, racial polarization in some parts of the country has declined and in others it has remained largely unchanged. *See, e.g.*, Richard Pildes, *Is*

Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s, 80 N.C. L. Rev. 1517, 1530-32 (2002). In some jurisdictions in which a given minority group constitutes less than 50% of the relevant electorate, minority-preferred candidates, particularly incumbents, can reliably secure sufficient crossover votes to be elected. Since 1982, seventeen of the nation's current twenty-five largest cities have elected African American or Hispanic mayors. *See* Census Bureau, *County and City Data Book: 2007* 710 (2007), http://www.census.gov/prod/2008pubs/07ccdb/fig3.pdf; Census Bureau, *Census 2000 Data Highlights*, http://www.census.gov/main/www/cen2000.html (last visited June 16, 2008). Only three of those cities are majority-African American and only two are majority Hispanic; however, most are cities in which Anglo-whites also constitute a minority.

The same is true for most of the members of the Congressional Black Caucus who have greatly benefited from the general election votes of other minorities. Half of the forty current members of the Congressional Black Caucus have been elected from districts that are under 50% African American VAP. However, all but five represent districts in which non-Hispanic whites are also a minority of the VAP.[6] *See* Census Bureau, *110th Congressional District Summary File*, Tbls. P4 and P6, http://factfinder.census.gov/servlet/DatasetTableListServlet?_ds_name=DEC_2000_110H&_type=table&_program=DEC&_lang=en&_ts=230490388528. Several of

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[6] Seven of the twenty-seven Hispanic members of Congress represent districts that are minority Hispanic VAP; however, only two represent districts in which Non-Hispanic whites constitute a majority of the VAP. *See* Census Bureau, *110th Congressional District Summary File, supra*, tbls. P4 and P6.

the current CBC members were elected in 1992 from majority-African American districts, later redrawn after court decisions to become minority-African American districts. While almost all of these incumbents were reelected, this was in no small measure because they did not confront any primary challengers, *see* Part II.C, *infra*, and also benefited from their incumbent status in other ways, *see* Part II.D, *infra*. *See* Grofman, et al., *supra*, at 1402-04, 1407-08; Charles. S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L.J. 1209, 1223 (1999).

Just as some areas of the country have witnessed declines in racial polarization, racial bloc voting in other areas has remained resilient. In Louisiana, for example, one study found extreme racial polarization in seventy-eight of the ninety elections analyzed featuring an African American candidate, with supermajorities of African Americans supporting the African American candidate and super majorities of whites supporting others. *See Voting Rights Act: The Continuing Need for Section 5: Hearing Before the H. Subcomm. on the Constitution, H. Comm. On the Judiciary*, 109th Congress (2005) (Testimony of Richard L. Engstrom), *available at* http://judiciary.house.gov/media/pdfs/engstrom102505.pdf. As late as 2006, this Court characterized the level of racially polarized voting in a contested Texas congressional district, House District 23, as "especially severe" after crediting expert findings presented to the District Court that showed 92% of Latinos voted for their candidate of choice while 88% of Anglo-whites voted against him. *LULAC*, 548 U.S. 399, 162 S. Ct. at 2615. State House elections in South Carolina

throughout the 1990s also provide useful data to demonstrate the persistence of differing political preferences of white and African American voters. One study has found that in the nineteen general elections in the 1990s that featured an African American candidate of choice, the candidate of choice received an average of 93% of the black vote but only 31% of the white vote. Grofman et al., *supra*, at 1420. Indeed, non-incumbent black candidates garnered, on average, only 16% of the white vote. Such patterns are often even more severe at the local level. *See, e.g.*, *Charleston County*, 365 F.3d at 350 (noting racially polarized voting in all ten County Council elections involving a black candidate).

C. The Size of the Minority Group's Share of a District's Primary Electorate Often Affects the Group's Opportunity to Elect Their Candidate of Choice.

The minority share of the primary electorate and the rules governing the primary often exist as critical factors in determining whether minorities have an equal opportunity to elect their candidate of choice. Because party allegiance will lead many non-minority voters to support almost any party nominee in the general election, the critical question in some jurisdictions is whether minority voters can control the primary election.

In jurisdictions with closed primaries and high rates of party voting in general elections, a minority group that constitutes a substantial majority of the primary electorate will sometimes have an equal opportunity to elect its candidate of choice, even if it comprises less than 50% of the

electorate in the general election. Because of political segregation, in most legislative districts in the country one or the other party tends to dominate, such that the critical election for such districts occurs at the primary stage, rather than the general election. *See* Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008). A minority population that can control the primary election will be able to elect its candidate of choice if sufficient numbers of fellow non-minority partisans will cross over in the general election.

If the primary is an open primary or nonpartisan primary, the required minority share may need to be greater. If, in effect, whites from both parties can control which candidates will appear on the general election ballot, a large minority community might not have an opportunity to vote for its candidate of choice in the general election. Under such conditions, and especially if party loyalty plays a limited role in white voters' preferences, a district in excess of 50% may be necessary for minorities to have an equal opportunity to elect their candidate of choice.

D. A Minority Group's Electoral Opportunity Often Depends on Whether Its Candidate of Choice Is an Incumbent.

The ability to scare off primary challengers is just one of the advantages of incumbency that can enable minority-preferred candidates to win in districts with minority populations below 50%. More specifically, the minority percentages necessary for a

minority-preferred candidate to have an equal opportunity to be elected will escalate depending on whether the district is already held by a minority-preferred candidate, is an open seat without an incumbent, or is a seat held by an incumbent who is not the minority's candidate of choice. Rates of incumbent reelection in the U.S. House of Representatives have exceeded 95% in most recent elections. *See, e.g.*, Alan Abramowitz, The Am. Pol. Sci. Ass'n, *The 2004 Congressional Elections* (2004), http://www.apsanet.org/content_5179.cfm. Incumbent minority candidates of choice enjoy similar reelection rates, although some studies have found that black incumbents do not experience as large an electoral "bump" due to incumbency as white incumbents do. *See, e.g.*, Bullock & Dunn, *supra*, at 1230-31 (1999).

The different minority percentages necessary for an incumbent, a challenger, or an open seat candidate to win are clearly demonstrated by the history of the districts that this Court struck down in its *Shaw v. Reno* line of cases. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995). At their inception in 1992, many of those districts were substantial majority-minority districts, almost all of which elected new minority candidates in open seats. When this Court and the lower courts struck down nine of those majority African American congressional districts as excessively race-based, eight were redrawn with African American populations below 50%. Grofman et al., *supra*, at 1397. In seven of those districts, the African American incumbent ran and won reelection from the redrawn district. (In one, the Louisiana 4th, neither the African American incumbent nor any other African American candidate competed.) *Id.*

at 1400. Because so few faced any serious primary opposition and because they all won about one-third of the white vote in the general election, all easily won reelection throughout the 1990s, even from minority-African American districts. *Id.* at 1401.

The study of South Carolina data, discussed earlier, also shows the importance of a district's incumbency status. Because African American incumbents rarely faced primary challengers and could rely on some white crossover votes in the general election, the study found that such incumbents had a 50% chance of winning from districts that were as low as 37% African American. Grofman et al., *supra*, at 1421. However, a district would need to be as much as 64% African American for an African American challenger to have an equal chance of defeating a white incumbent. In open seats, the required percentage for African Americans to have an equal opportunity to elect their candidate of choice was in the middle (51%). *See id.*

E. The Methodology Employed by Expert Witnesses in Vote Dilution Cases Does Not Depend on Legally Prescribed Population Thresholds.

The role of an expert witness in a vote dilution case will not change based on whether the Court interprets section 2 of the VRA to apply only to potential districts that satisfy certain population thresholds. Determining whether a potential district presents minority groups with an equal opportunity to elect their candidates of choice will continue to require careful racial bloc voting analyses and locally based assessments similar to those that experts have been making since *Gingles* and even long before.

Indeed, those methods and assessments, themselves, will also provide a limit on the potential number of viable dilution claims.

Because the secret ballot prevents one from knowing exactly which voter of which race cast a particular vote, experts must estimate the relationship between race and vote choice from aggregated data. There are three principal statistical approaches that experts use to assess the extent of racial bloc voting: homogeneous (or extreme) precinct analysis, ecological regression, and ecological inference. *See* Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *The Real Y2K Problem: Census 2000 Data and Redistricting Technology* (N. Persily ed., 2000) (describing all three methods). Each method relies on a comparison of election results with race data for a particular geographic area to establish whether there is "'a consistent relationship between the race of the voter and the way in which the voter votes.'" Gingles, 478 U.S. at 53 n. 21 (quoting testimony of Grofman).

Homogeneous (or extreme) precinct analysis requires a comparison of election results in precincts heavily dominated by voters of one race. If, to take the extreme case, precincts with no African American voters vote for one candidate while precincts with only African American voters vote for a different candidate, one might safely assume that voting in the jurisdiction is polarized. Of course, the ability to perform such analysis rests on the existence of a certain number of near-homogeneous precincts, and in any event might require the analyst to throw away most of the election data available if it comes from more integrated precincts. The next two methods do not have those flaws.

Ecological regression is a familiar tool not only for racial bloc voting analysis but for a multitude of scientific and social scientific inquiries. The basic task of the analyst is to gather election and race data for particular geographic units, such as precincts, and then to estimate the share of the minority and majority population voting for and against particular candidates. Each precinct provides a data point both as to the racial percentages in the district and the vote for the minority-preferred candidate, and the closer the relationship between the minority share of precincts and the vote shares received by the candidate, the more racially polarized the electorate. In other words, under conditions of racial polarization, as a precinct becomes more heavily minority, it also tends to vote more heavily for a particular candidate.

Ecological inference, as developed by political scientist Gary King, is more complicated than the other methods (and impossible to describe briefly here), but this method attacks more specifically the problem of estimating individual behavior from aggregate data. *See* Gary King, *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data* (1997). Each precinct can be described according to the possible share of the minority community voting for the minority candidate of choice. In a precinct that is 50% white and 50% African American but in which the African American candidate receives only 50% of the vote, it is possible that all African Americans voted for the African-American candidate, none did, or any percentage in between those two extremes did. In other precincts (as with near homogeneous precincts voting almost unanimously for the African American candidate)

the possible range of options will be more limited. All of these bounded probabilities from each precinct can then be used to estimate with some degree of confidence the likelihood that a certain percentage of the minority community tended to vote for the minority candidate.

Although each method will produce different estimates of the tendency for voters of different races to vote for different candidates, under conditions of racial polarization all methods usually will point in the same direction. However, racial bloc voting analysis and the estimates derived from it do not supplant a common sense appreciation for local political circumstances. Even within the same state, two districts that have the same racial makeup may "perform" quite differently based on the different history and political behavior of voters and candidates in those areas. As our discussion of turnout, incumbency, and the primary electorate indicates, accurate assessments of minority political opportunity often require more than an examination of racial and political data.

With that said, it should be clear that racial bloc voting analysis puts a serious constraint on the potential number of section 2 claims that can be brought, irrespective of any population threshold required as part of the vote dilution inquiry. At a minimum, for example, any potential district that will require a majority of white voters to cross over to vote for the minority-preferred candidate cannot be said to give rise to a viable section 2 claim. Similarly, if voting patterns are completely polarized, a minority community that would constitute a small share of a potential single-member district cannot plausibly make the claim that their political opportunity would be equal if

such a district were constructed. It may be the case that allowing claims for potential districts that are under 50% minority might increase the number and variety of such claims. However, the requirement of the existence of racial bloc voting will continue to act as a serious constraint on which claims have merit and which jurisdictions will be vulnerable.

CONCLUSION

Judicial interpretations of the Voting Rights Act ought to account for the practical realities that confront experts drawing redistricting plans or testifying in redistricting cases. One of those realities concerns the variety and limitations of statistics to describe minority population percentages. Another concerns the range of jurisdiction-specific factors that influence whether a minority community has an equal opportunity to elect its candidate of choice.

Regardless of the outcome of this particular case, redistricting experts will continue to employ the best available data to estimate the likely minority share of electorate. Their inquiries will be constrained by what the Census Bureau makes available in its redistricting datafile, as well as by the biases and errors that necessarily accompany any usable measures of the national population. The Court's interpretation of section 2 of the Voting Rights Act ought to recognize these data-related challenges in estimating the actual size of the minority population in potential districts.

Even with agreed-upon population metrics, however, accurately assessing a minority group's opportunity to elect its candidate of choice will

require a sensitive inquiry into the unique local political dynamics of a given jurisdiction. The minority population share necessary to provide such equal opportunity (for both the primary and general election) will vary substantially by region and racial group, and will depend on such factors as the levels of racial bloc voting, relative voter turnout, the potential for coalition building among minorities, and the incumbency status of a district. Such assessments will vary over time, between different states, and often within states, given the evolution of local politics and demographic change. As in other arenas of election law, when it comes to evaluating whether a minority community has an equal opportunity to elect its candidate of choice, there may be "no substitute for the hard judgments that must be made." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Respectfully submitted,

*NATHANIEL PERSILY
COLUMBIA LAW SCHOOL
JEROME GREENE HALL
435 West 116th Street
New York, NY 10027
(212) 854-8379

MICHAEL B. DE LEEUW
DALE E. HO
JORDAN M. BARRY
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON, LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

*Counsel of Record

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